United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR THE PETITIONERS

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

552

No. 22,116

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA, ET AL., *Petitioners,*

v.

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES, *Respondents,*
NATIONAL CABLE TELEVISION ASSOCIATION, INC., ET AL., *Intervenors.*

Petition to Review an Order of the Federal Communications Commission

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October 16, 1968

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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JURISDICTION

The jurisdiction of this Court is invoked under Sections 402(a) and (b) of the Communications Act of 1934, as amended, (47 U.S.C. § 402(a) and (b)) and Section 2 of the Judicial Review Act (28 U.S.C. § 2342).

ISSUES PRESENTED

These petitioners will present arguments on the following issues:[1]

1. Whether the Commission erred in holding that it is authorized to enter cease and desist orders under Section 312 of the Communications Act to enforce Section 214 of the Act?

[1] The issues stated are covered by the stipulation made by the parties to this proceeding and filed on September 5, 1968. Certain issues included in the stipulation but not stated above will be argued by other parties in this consolidated proceeding.

This case has not previously been before this Court.

2. Whether the Commission erred in deciding that communications service through cable facilities used by a common carrier to carry signals from the tower or headend of a CATV system to the premises of CATV subscribers is an interstate, rather than an intrastate, communications service, where the said facilities are located wholly within a single state and, if so, whether the Commission erred in concluding that such service and the facilities used to provide it are not exempted from its jurisdiction?

3. Whether the Commission erred in deciding that common carriers must apply for certification pursuant to Section 214 of the Communications Act before acquiring, operating or undertaking the construction of distribution facilities to provide channel service to CATV systems where the said facilities are located wholly within single states and are not connected with other common carrier facilities and irrespective of whether the distance between the end points of such facilities is less than ten (10) miles?

4. Whether the Commission's decision is supported by adequate findings based upon substantial evidence, has a rational basis in the record, or is in compliance with Section 8(b) of the Administrative Procedure Act?

STATUTES INVOLVED

The relevant provisions of the Communications Act of 1934, as amended, and of the Interstate Commerce Act are set forth in full in the addendum to this brief.

STATEMENT OF THE CASE

This is a proceeding to enjoin, set aside and annul a decision and order of the Federal Communications Commission (hereinafter sometimes referred to as the "Commission") released on June 26, 1968. (R. 2853-89). The petitioners are 19 operating telephone companies (hereinafter sometimes referred to as the "Bell System Companies" or the "Companies") and the American Tele-

phone and Telegraph Company ("AT & T"), with which the operating companies are affiliated.

The Commission held that Section 214(a) of the Communications Act of 1934, as amended, (47 U.S.C. § 214(a)) requires that the Bell System Companies obtain certificates of public convenience and necessity for the common carrier facilities that those companies use in providing local distribution channel service to CATV operators, even though those facilities are confined in every instance to a small local area and are located entirely within a single state. (R. 2868, ¶ 25). The Commission rejected the contention that the facilities were not subject to Section 214(a) because of their intrastate and local character.

The Commission's order directed the Companies to file applications for certificates of public convenience and necessity for all construction heretofore undertaken for the purpose of providing service to CATV systems and to cease and desist from the further construction of CATV local distribution channel service facilities and, subject to certain qualifications and conditions, from the operation of existing facilities, until certificates of public convenience and necessity have been obtained. (R. 2881-82, ¶¶ 49-51).

I. The Nature of the Facilities and Services Involved

A CATV system consists of a receiving antenna, as well as equipment for the transmission or generation of other program material; an electronic device, commonly referred to as the "headend", that translates signals received on the antenna or otherwise obtained into signals capable of being transmitted along a coaxial cable;[1a] a coaxial cable distribution system that carries the translated signals from the CATV antenna site to the premises of the CATV op-

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[1a] Since the electrical signals furnished by the CATV operator to the headend cannot be transmitted directly along a cable, the headend, in effect, produces new electrical signals that contain essentially the same intelligence as is provided in the CATV operator's signals. There is, therefore, no direct through-communications path from the CATV operator's antenna to the cable distribution system. (Bell Ex. 2, pp. 7-16, R. 536-45; Tr. 528-29, 642-43, 675).

erator's patrons; and terminal devices on the patrons' property where the connection is made between the cable distribution system and the patrons' television sets. (Bell Ex. 2, pp. 3-5, R. 532-34; Bell Ex. 1, pp. 2-4, R. 519-21; Tr. 378, 414-15, 519, 646-47).

Most CATV operators in the United States own and operate all of the facilities involved in their systems. Such CATV operators not being common carriers are not subject to the Commission's jurisdiction under Section 214(a) and are therefore not affected by the Commission's decision and order. (R. 2854-55, ¶ 3). A very small percentage of the CATV operators, however, do not own the coaxial cable distribution system that carries the translated signals from the CATV antenna site to the premises of the CATV operator's customers but instead use a local distribution service provided by a common carrier.[2] The lines of the Bell System Companies that are here in issue provide such service through coaxial cable distributions systems.[3] As we shall explain below the service provided by the Bell System Companies is through facilities that are confined in every instance to a single telephone exchange area, that consist of lines lying entirely within a single state and that do not extend to locations more than ten miles from the CATV antenna. (Bell Ex. 1, pp. 10-11, R. 527-28; Bell Ex. 2, pp. 5, 21-22, R. 534, 550-51; CATV T.F. Ex. 2, Form A, Item 3, R. 1011; Tr. 381-83, 495-96, 519, 561-62, 665).

Carrier local distribution channel service begins at the headend. (Bell Ex. 2, pp. 7, 16, R. 536, 545; Tr. 378, 519). The coaxial cable used to provide this service is capable of simultaneously carrying 12 TV channels at VHF frequencies

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[2] As of late 1965 it was estimated that there were approximately 1800 operating CATV systems. CATV Second Report and Order, 2 F.C.C. 2d 725, 738 (1966). The record shows that the carriers involved in this proceeding, which includes all of the larger telephone systems in the United States, were supplying common carrier local distribution channel service to only 53 CATV systems. (CCB Ex. 1, R. 1435; United Ex. 1-5, R. 935-983A; General Ex. 1, p. 5, R. 830).

[3] The Commission found that the carriers generally provide service only from the headend to the premises of the CATV subscriber. (R. 2854, ¶ 3).

and the entire FM radio band. (Bell Ex. 2, p. 16, R. 545; Tr. 410).

The cable leading from the headend itself is called, in Bell System terminology, "feeder" cable. (Bell Ex. 2, pp. 16, 18, R. 545, 547; Tr. 420). This feeder cable may be placed separately on telephone poles or underground or it may be suspended from or lashed to a common supporting strand with other telephone cables. (Bell Ex. 2, p. 17, R. 546; Tr. 444). The physical limitations of coaxial cable, as well as other technological factors, impose a limit upon the distance from the headend over which signals can be transmitted at frequencies that can properly be received by television sets of the CATV operator's patrons. (*Ibid.*; Tr. 616-22). The Bell System Companies do not provide service to any CATV operator who has subscribers residing more than ten airline miles from the headend. (Bell Ex. 2, pp. 21-22, R. 550-51).

Feeder cable is not used to transmit a signal directly into a CATV subscriber's television set. Accordingly, at various intervals off the feeder there are branched off, in Bell System terminology, "distribution" cables. (Bell Ex. 2, p. 18, R. 547; Tr. 420). In Marion, Indiana, for example, distribution cable branches from the feeder at 180 separate locations. (CCB Ex. 2, p. 4, R. 1489). Technological factors impose rigid distance limitations upon the use of distribution cable. Thus, the maximum distance over which a satisfactory signal can be carried by a distribution cable is approximately half a mile. (Bell Ex. 2, p. 19, R. 548; Tr. 616-20).

Finally, leading off the distribution cable to the individual subscriber's premises are the so-called "drop-lines."[4] (Bell Ex. 2, pp. 19-20, R. 548-49). Because of the inherent signal loss in such lines, they are generally not used in lengths greater than 300 feet. (Bell Ex. 2, p. 20, R. 549). Although the Bell System Company may itself run wiring in the house to the vicinity of the televi-

[4] The distribution cable itself is run into some premises, for example, apartment buildings where there are a number of television sets to take the signal. (Bell Ex. 2, p. 19, R. 548; Tr. 422-23).

sion set, the drop-line does not run directly into the set. (*Ibid.;* Tr. 618).

In every instance where the Bell System Companies provide CATV local distribution channel service, the cable facilities are located wholly within a single state; no feeder or distribution cable or drop-line crosses any state line. (Bell Ex. 1, p. 10, R. 527; Bell Ex. 2, p. 5, R. 534). Moreover, in each of the locations that this service is provided there are no CATV subscribers lying beyond a ten-mile radius from the CATV operator's headend equipment. (Bell Ex. 2, pp. 16-22, R. 545-51). Finally, all the CATV local distribution channel service facilities utilized by Bell System Companies lie wholly within a single telephone exchange and consist of physical equipment that is designated as "exchange plant." (Bell Ex. 1, pp. 2, 10-11, R. 519, 527-28; Bell Ex. 2, p. 4, R. 533; Tr. 379, 381-82, 497-98). Thus, for example, the feeder and distribution cable and drop-lines used for the service are strung on the same poles as cable carrying other forms of telephone exchange service. (Bell Ex. 2, p. 17, R. 546; Tr. 382, 497-98). Indeed, the very cable used to provide this service is sometimes only one part of a larger cable that contains other circuits used for providing other forms of telephone exchange service. (Bell Ex. 2, pp. 16-17, R. 545-46; Tr. 443).

II. The Proceedings Before the Commission

Although the Bell System operating companies have offered common carrier local distribution channel service to CATV operators since 1959, the Commission made no effort to assert Federal jurisdiction over the service until 1966. (Bell Ex. 1, pp. 9, 12, R. 526, 529). Prior to that year, this common carrier service had been regulated solely by state and local agencies, and the Companies had filed tariffs for this service with those agencies. (Bell Ex. 1, p. 11, R. 528; Tr. 529-30). On April 6, 1966, the Commission in a letter to AT&T and the General Telephone and Electronic Service Corporation ("General") directed that (R. 2855, ¶ 4):

> ". . . the operating telephone companies . . . file tariffs with this Commission, pursuant to Sections 202

> (b) and 203(a) of the Communications Act of 1934, as amended, covering the furnishing of local distribution facilities for use by CATV systems. . . ."

Under protest the Bell Companies filed tariffs for this service. (Bell Ex. 1, p. 12, R. 529). At the same time, AT&T filed a petition for reconsideration. This petition was denied, 4 F.C.C.2d 257 (1966), and each of the Bell System Companies offering the service filed revised tariffs to become effective November 1, 1966.

On October 20, 1966, the Commission instituted an investigation, pursuant to Sections 201-205, 214 and 403 into the lawfulness of these revised tariffs. 5 F.C.C.2d 357, 358. This order made the Bell System Companies parties and allowed for the intervention of AT&T. By another order, 6 F.C.C.2d 434 (1967), the Commission instituted an investigation into the channel service tariff offered by General and the subsidiaries of United Utilities, Inc., ("United"). The proceedings against the Bell System Companies, General and United were then consolidated. 6 F.C.C. 2d 440 (1967).

On March 29, 1967, the Commission determined that the Section 214 issues designated in its earlier order involved adjudication rather than rule-making and thereupon separated those issues for hearing and decision in a separate proceeding (Docket No. 17,333). 7 F.C.C. 2d 571, 575. At the same time the Commission found, pursuant to Section 409(a) of the Act, that due and timely execution of its functions required that upon completion of the evidence the Hearing Examiner certify the record, without a recommended decision, to the Commission. *Id.* at 576.

Pursuant to the Commission's order hearings were held before an Examiner. (R. 2858, ¶ 9). The Bell System Companies, General, and United presented direct cases challenging the Commission's jurisdiction under Section 214. Both the Commission's Common Carrier Bureau and its CATV Task Force appeared in support of the Commission's jurisdiction. Other parties appeared either in support of or against the assertion of jurisdiction under

Section 214. (R. 2858, ¶ 10). On August 23, 1967, the Hearing Examiner certified the record to the Commission. (R. 1538; 2858, ¶ 9).

The Commission heard oral argument on February 26, 1968, and on June 26, 1968, released its decision and order. (R. 2853, 2858, ¶ 10).

In its decision the Commission determined that the facilities used by the Bell System Companies and the other telephone companies to provide common carrier service to CATV systems were covered by the provisions of Section 214(a) of the Act and that certificates of public convenience and necessity were therefore required for those facilities. (R. 2868, ¶ 25). In so determining the Commission held that the service the carriers are performing is not "intrastate communication service" within the meaning of Section 2(b)(1) of the Act, which exempts such service and the "facilities" used to provide it from the requirements of Section 214(a) and from the other provisions of Title II of the Act. (R. 2861-62, ¶ 13). It also held that the exceptions set forth in Sections 214(a) and 221(b) did not apply to the facilities involved. Thus, the Commission held that the lines involved although lying wholly within single states were parts of interstate lines and hence were not covered by Section 214(a)(1); that they were not local, branch or terminal lines within the meaning of Section 214(a)(2); and that they were not lines used to provide telephone exchange service within the meaning of Section 221(b). (R. 2864-68, ¶¶ 17-24).

In its order the Commission directed the operating telephone companies of the Bell System and of General and United to file applications for certificates of public convenience and necessity pursuant to Section 214 of the Act for all construction theretofore undertaken for the purpose of providing service to CATV systems. (R. 2881, ¶ 49). The Commission, invoking Section 312(b) of the Act, also included in its order provisions directing the operating telephone companies to cease and desist from (a) the further construction of any facilities for CATV service

until certificates of convenience and necessity covering those facilities have been obtained, and (b) the operation of any CATV distribution facilities that were completed on or before the release of the decision subject, however, to a provision that permitted continued operation of the facilities if applications for certificates are filed and if certain other conditions are met.[5] Subsequently the Commission stayed the provisions of its cease and desist order pending judicial review, except insofar as they relate to new construction or to the operation of systems that were not activated on or before June 26, 1968. (R. 3056-63).

ARGUMENT

I. THE COMMUNICATIONS ACT DOES NOT AUTHORIZE THE COMMISSION TO ENFORCE SECTION 214(a) BY CEASE AND DESIST ORDERS OR OTHER FORMS OF ADMINISTRATIVE PROCESS BUT REQUIRES THE COMMISSION TO SEEK INJUNCTIVE RELIEF IN A COURT TO RESTRAIN VIOLATIONS OF THAT SECTION

At the threshold of this case the question arises whether the Commission has authority to restrain alleged violations of Section 214(a) of the Communications Act of 1934, as amended, through the use of an administrative order. We submit that the Commission is not authorized to enforce Section 214(a) in this way but must seek injunctive relief in a court in accordance with Section 214(c). If we are correct in this contention, the order entered by the Commission in this case is invalid, and it is unnecessary for

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[5] The Commission's order allows the continued operation of facilities where 50% of the installation had been completed on October 21, 1966, provided the carriers file applications for Section 214 certificates. (R. 2871, ¶ 33; R. 2881, ¶ 51a). As to those facilities that were in operation prior to the release date of the Commission's order but which were not 50% completed on October 21, 1966, the Commission's order allows continued operation, provided the carriers file applications for certificates, as well as pleadings which establish, in essence, that a cease and desist order would result in complete deprivation of CATV service to a community or that set forth "other public interest factors" which warrant relief from the order. (R. 2872-73, ¶ 34; R. 2881-82, ¶ 51 b, c). As to facilities that were not in operation on the release date of the Commission's order, the carriers are not allowed to undertake or complete construction until the Commission issues Section 214 certificates. (R. 2873, ¶ 35; R. 2881, ¶ 50).

this Court to consider whether the CATV channel service facilities here at issue are subject to Section 214(a), since that question must be decided *de novo* in a judicial proceeding.

Section 214(a) provides in pertinent part that, subject to certain exceptions, no carrier shall construct, acquire, extend or operate any "line" without first obtaining a certificate of public convenience and necessity from the Commission. Section 214(c) sets forth in detail the Commission's powers with respect to the issuance of certificates:

> "The Commission shall have power to issue such certificate as applied for, or to refuse to issue it, or to issue it for a portion or portions of a line, or extension thereof, or discontinuance, reduction, or impairment of service, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. After issuance of such certificate, and not before, the carrier may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, extension, acquisition, operation, or discontinuance, reduction, or impairment of service covered thereby."

The subsection then provides:

> "Any construction, extension, acquisition, operation, discontinuance, reduction, or impairment of service contrary to the provisions of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, the State commission, any State affected, or any party in interest."[6]

Section 214 imposes upon communications carriers a regulatory plan similar to that embodied in Sections 1(18)-

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[6] Jurisdiction to enforce this provision of the Act is conferred upon the District Courts of the United States by 28 U.S.C. §§ 1337 & 1345.

(22) of the Interstate Commerce Act.[7] This is demonstrated by the similarity in the language of the two sets of statutory provisions and is confirmed beyond question by the legislative history of the Communications Act of 1934. The Committee Reports recommending passage of that statute explicitly state that Section 214 was patterned after Sections 1(18)-(22) of the Interstate Commerce Act. Sen. Rep. No. 781, Committee on Interstate Commerce, 73d Cong., 2d Sess., pp. 2, 5 (1934); H. R. Rep. No. 1850, Committee on Interstate and Foreign Commerce, 73d Cong., 2d Sess., pp. 5-6 (1934).

The last sentence of Section 214(c) of the Communications Act is, except for certain minor and irrelevant differences, stated in precisely the same words that are found in the comparable sentence in Section 1(20) of the Interstate Commerce Act.[8] Decisions interpreting and applying Section 1(20) of the Interstate Commerce Act are therefore authoritative on the interpretation and application of Section 214(c) of the Communications Act.

In a line of decisions the courts have held that Section 1(20) of the Interstate Commerce Act prevents the Interstate Commerce Commission from enforcing the certification provisions of Section 1(18) by administrative order and that the exclusive method of enforcement of those provisions is by a suit brought in a court where the issue of the Commission's jurisdiction over the facilities in question will be tried *de novo*. *Texas & Pacific Ry.* v. *Gulf, Etc. Ry.*, 270 U.S. 266 (1926); *St. Louis S.W. R.R.* v. *Missouri Pac. R.R.*, 289 U.S. 76, 81-82 (1933); *United*

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[7] There are some differences between the provisions of the two statutes and one of those differences has substantive significance in the present litigation. That is the difference that exists between the provisions of Section 214(a)(1), (2) and (3) and Section 1(22) of the Interstate Commerce Act. See pages 42-43, *infra*.

[8] Section 1(20) of the Interstate Commerce Act provides in pertinent part:

"Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest . . . ."

States v. *Idaho,* 298 U.S. 105 (1936); *Powell* v. *United States,* 300 U.S. 276 (1937); *Meyers* v. *Famous Realty, Inc.,* 271 F.2d 811, 816 n.6 (2d Cir. 1959), *cert. denied,* 362 U.S. 910 (1960); *Chicago & E. I. R.R.* v. *Illinois Cen. R.R.,* 261 F. Supp. 289, 295 (N.D. Ill. 1966); *Long Is. R.R.* v. *New York Cen. R.R.,* 185 F. Supp. 673 (E.D.N.Y.), *aff'd,* 281 F.2d 379 (2d Cir. 1960).[9] Cf. *ICC* v. *Memphis Union Station Co.,* 360 F.2d 44 (6th Cir.), *cert. denied,* 385 U.S. 830 (1966).

In *Texas & Pac. Ry.* v. *Gulf, Etc. Ry., supra,* the Supreme Court rejected an argument that the appropriate method for dealing with an extension alleged to be unlawful under Section 1(18) of the Interstate Commerce Act was by a proceeding before the Commission followed by an administrative cease and desist order (270 U.S. at 268-269, 272), and did so in terms that made it plain that it regarded as exclusive the judicial remedy provided by Section 1(20) (*id.* at 273):

> "But a party in interest who is opposed to the construction is not authorized by the Act to initiate before the Commission any proceeding concerning the project. If application for a certificate has been made, he may appear there in opposition. If no such application has been made, paragraph 20 affords him the only remedy. That remedy is both affirmative and complete."

In *Powell* v. *United States, supra,* the Court held that an order of the Interstate Commerce Commission striking a tariff could not be justified on the ground that the tariff called for service over an extension for which no certificate had been obtained under Section 1(18) of the Interstate Commerce Act (300 U.S. at 287-89):

> "[Section 1(20)] provides the only method for enforcing § 1(18). It declares that any construction or

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[9] In St. Louis S.W. R.R. v. Missouri Pac. R.R., 289 U.S. 76, 82 n.3 (1933), the Court after citing a list of cases in which injunctive relief had been sought under Section 1(20) of the Interstate Commerce Act said:

> "No case in the Federal courts has been found in which any other method was pursued to secure relief against what was believed to be an unauthorized extension."

> operation contrary to § 1(18) may be enjoined at the suit of the United States, the commission, the regulating body of the State affected or any party in interest.
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> * * * *
>
> "The governing statutory provisions do not permit substitution of the commission's order for a decree of court .... The statutes cannot be construed to give the commission, a carrier or other party seeking to enforce § 1(18) a choice of remedies . . . a suit under § 1(20).... is exclusive." [10]

The internal structure of Section 214 of the Communications Act, like that of the comparable provisions of the Interstate Commerce Act, supports the conclusion that Congress did not in either case authorize the agency to enforce the certification provisions of the act by administrative order. Section 214(d) of the Communications Act, like Section 1(21) of the Interstate Commerce Act, provides that "The Commission may, after full opportunity for hearing, . . . authorize or require by order any carrier . . . to provide itself with adequate facilities . . . ." In these provisions Congress expressly authorized the agencies to use administrative orders to enforce the statutory requirement that carriers provide adequate facilities. Yet in the immediately preceding provisions dealing with certificates of convenience and necessity Congress provided for enforcement only by a suit for injunctive relief in a court. This contrast shows that the omission of a provision for administrative enforcement in Sections 214(c) and 1(20) was not a legislative oversight.

The Commission rejected the contention that it was not authorized to enforce Section 214(a) by a cease and desist order without even referring to the decisions interpreting

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[10] In United States v. Idaho, 298 U.S. 105 (1936), the Court held that an administrative decision by the Interstate Commerce Commission that a line was an extension and hence subject to the Commission's power to authorize abandonment, even though supported by substantial evidence, was not conclusive in a subsequent suit brought in a district court because the Commission's jurisdiction could be tried *de novo* in that court.

and applying the similar provisions of the Interstate Commerce Act.[11] The Commission simply asserted, without supporting reasons, that it is not limited to the judicial remedy provided by Section 214(c) and that under the provisions of Section 312(b) of the Communications Act it is authorized to issue an order requiring a carrier to cease and desist from any construction or operation of facilities found by the Commission to be in violation of Section 214(a).

The Commission's assertion must rest upon the unarticulated assumption that although decisions under the Interstate Commerce Act would be controlling on the interpretation of Section 214(c) if it stood alone, Section 312(b) modifies Section 214(c) by expanding the remedies available to the Commission and that accordingly those decisions may be disregarded. This assumption will not bear analysis.

Section 312(b) is found in Title III of the Communications Act which deals exclusively with the regulation of radio, in contrast with Title II which gives the Commission general authority over common carriers.[12] The section was first added to the statute in 1952, 66 Stat. 717, and was one of several amendments that were described by one of the sponsoring Congressmen as being only changes in Titles I, III and IV of the Act which would not "seriously"

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[11] The Commission's disregard of these decisions is somewhat surprising in view of the fact that until this proceeding it had treated these decisions as relevant authorities in determining the scope of its authority under Section 214. See Mackay Radio & Telegraph Co., 6 F.C.C. 562, 568 (1938); American Tel. & Tel. Co., 23 F.C.C. 689, 695 (1957); Press Wireless, Inc., 25 F.C.C. 1466, 1473-74 (1958). In Mackay Radio & Telegraph, the Commission conceded the authority of Powell v. United States, but held that the decision was inapplicable because "no order having the effect of an injunction is contemplated." And in Press Wireless, Inc., the Commission appeared to recognize that under *Powell* the Commission could not strike a tariff "on the basis of a determination which the Commission had no jurisdiction to make, but which lay exclusively within the province of the district court."

[12] For purposes of judicial review the statute classifies cease and desist orders based upon Section 312(b) with orders relating to radio licenses and similar matters. See Section 402(b).

affect the other titles. 98 Cong. Rec. 7397 (1952). Section 312(b) was designed primarily to give the Commission an administrative sanction against radio licensees that was less severe than the revocation of a license. S. Rep. No. 44, Committee on Interstate Commerce, 82d Cong., 1st Sess. pp. 9-10 (1951); Conference Report, H.R. Rep. No. 2426, 82d Cong., 2d Sess. p. 20 (1952). See *C. J. Community Services* v. *FCC*, 100 U.S. App. D.C. 379, 384, 246 F.2d 660, 665 (1957) (concurring opinion). See also *Head* v. *New Mexico Bd.*, 374 U.S. 424, 434-36 (1963) (concurring opinion). Nothing in the legislative history suggests that Section 312(b) was intended to expand the remedial powers of the Commission under Title II and indeed the comments on the section in the Committee reports cited above point in the contrary direction.[13]

There is, therefore, no valid basis for the Commission's assumption that Section 312(b) expands in any way the remedial powers given the Commission in Title II with respect to common carriers. It is unnecessary in this case, however, to consider the broad and abstract question whether the Commission could ever invoke its powers under Section 312(b) to deal with violations of Title II. The narrower question presented here is whether the general authority conferred by Section 312(b), even if read as extending to cases under Title II, is limited by Section 214, or whether Section 312(b) modifies or amends Section 214(c) by conferring upon the Commission a cumulative remedy that it would not otherwise possess. Section 312(b) cannot reasonably be read as having the latter effect.

When Section 312(b) was enacted the Commission already had the authority to enforce the provisions of Title II of the statute by issuing cease and desist orders against carriers. Section 205 of the Communications Act authorizes the Commission to order a carrier to cease and desist from

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[13] Heretofore the Commission has exercised its powers under the section only in cases involving radio or matters that directly affect radio and hence are subject to regulation under Title III. See Buckeye Cablevision, Inc. v. FCC, — U.S. App. D.C. —, 387 F.2d 220 (1967); United States v. National Plastikwear Fashions, 123 F. Supp. 791 (S.D.N.Y. 1954).

any practice that is or will be in violation of any of the provisions of the Act—a grant of power whose terms, were it not for Section 214(c), would be sufficiently broad to include authority to order a carrier to cease and desist from the construction or operation of facilities in violation of Section 214(a). Section 205 is derived from Section 15(1) of the Interstate Commerce Act which confers an identical power upon the Interstate Commerce Commission. Sen. Rep. No. 781, *supra* at p. 4; H.R. Rep. No. 1850, *supra* at p. 6. This power was invoked by the litigants and assumed by the Court in *Texas & Pac. Ry.* v. *Gulf, Etc. Ry.*, 270 U.S. 266 (1926), and *Powell* v. *United States*, 300 U.S. 276 (1937). Yet the Court there held that this administrative remedy could not be exercised to enforce the provisions of Section 1(18) of the Act but that the Commission was remitted to the judicial remedy provided by Section 1(20). These decisions require the conclusion that the general authority conferred upon the Commission by Section 205 of the Communications Act is similarly limited by Section 214(c). In this respect there is no valid basis for a distinction between Section 205 and Section 312(b) and the limitation stated by Section 214(c) should apply with equal force to both sections. Section 214(c) being specific in character controls the more general provisions of the other two sections. *MacEvoy Co.* v. *United States*, 322 U.S. 102, 107 (1944); *Ginsberg & Sons* v. *Popkin*, 285 U.S. 204, 208 (1932).

The Supreme Court decisions beginning with *Texas & Pac. Ry.* v. *Gulf, Etc. Ry., supra,* and including *Powell* v. *United States, supra,* were decided and well known long before the enactment of Section 312(b). It is inconceivable that if Congress intended to nullify those holdings by providing for direct administrative enforcement of Section 214(a) it would not have given some indication, no matter how slight, of that intent either in the words of Section 312(b) or in its legislative history. No such indication is to be found in either place.

In short, Congress has not authorized the Commission to enjoin by administrative order the construction and op-

eration of carrier facilities simply on the basis of its own administrative determination that those facilities are subject to its jurisdiction under Section 214(a) of the Communications Act. Instead it has provided that trial courts shall decide *de novo* whether facilities are subject to Section 214(a) and, if so, whether and on what terms their construction or operation should be enjoined. The Commission's cease and desist orders are therefore in excess of its statutory authority and for that reason should be set aside.

II. THE COMMISSION ERRED IN DECIDING THAT COMMON CARRIER SERVICE TO CATV OPERATORS CONSTITUTES AN INTERSTATE, RATHER THAN AN INTRASTATE, COMMUNICATION SERVICE

Section 2(b)(1) of the Communications Act (47 U.S.C. § 152(b)(1)) provides:

> "Subject to the provisions of section 301 of this title, nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier. . . ."

The record shows that in every instance where a Bell System Company furnishes common carrier service to a CATV operator the cable facilities of the company lie wholly within a single state. (Bell Ex. 1, p. 10, R. 527; Bell Ex. 2, p. 5, R. 534). The record did not show and the Commission did not find that these facilities are connected to any other common carrier lines, interstate or otherwise, and it is undisputed that neither broadcasters nor CATV operators are common carriers. Section 3(h), 47 U.S.C. § 153(h); *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 169 n.29 (1968). The Bell System Companies argued before the Commission that since their common carrier service was performed wholly within single states and without connection with any other common carrier their service was an "intrastate communication service by wire"

within the meaning of Section 2(b)(1). They therefore argued that the lines used in that service were "facilities" that were not subject to Section 214.

The Commission rejected these contentions (R. 2862, ¶ 13):

> "The controlling facts here are that the cable facilities furnished by the telephone companies are links in the continuous transmission of the signals from the point of origin to the set of the viewer, and the intelligence received by the viewer is essentially the same as that transmitted by the broadcaster."

The Commission relying upon both the fact that broadcast television signals themselves are interstate communications and the holding of the Supreme Court in *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 168 (1968), that "CATV systems are engaged in interstate communications," concluded that the service provided by the common carriers in this case was an interstate service and that Section 2(b)(1) was not applicable.[14]

There are two errors interwoven in this conclusion. One is the Commission's assumption that a common carrier whose facilities and services are confined to a single state is nonetheless necessarily engaged in interstate service if it transmits interstate "intelligence", *i.e.*, communications received from an interstate source. The other is the Commission's holding that for the purpose of applying Section 2(b)(1) it could properly combine the intrastate lines and services of a common carrier with the interstate broadcast signals of non-common carriers, and thereby deprive the common carrier services involved of their intrastate character. These errors ignore the basic structure of the Communications Act, the purpose underlying that structure, and relevant authority.

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[14] The Commission also cited Idaho Microwave, Inc. v. FCC, 122 U.S.App.D.C. 253, 352 F.2d 729 (1965) and Ward v. Northern Ohio Tel. Co., 300 F.2d 816 (6th Cir.), *cert. denied*, 371 U.S. 820 (1962), as well as one of its own earlier decisions. These cases will be discussed below, pp. 28-30, *infra*.

The error of the Commission's assumption that under Section 2(b)(1) any common carrier service that transmits interstate communications is necessarily an interstate communication service is demonstrable by an analysis of the structure of the statute. That analysis should begin with Section 2(a):

> "The provisions of this chapter shall apply to all interstate and foreign communication by wire or radio . . . ."

The provisions of the Act which are made applicable to interstate communications are by no means all dedicated to implementing the Commission's jurisdiction. Many specifically remove jurisdiction that would otherwise belong to the Commission by virtue of Section 2(a). Thus, for example, Section 2(b)(1), at issue here, deprives the Commission of Title II jurisdiction over carriers with respect to "intrastate communication service," while preserving jurisdiction with respect to Title III of the Act. See also Sections 2(b)(2), (3), 214(a)(1), (2), (3) and 221(b).

The error in the Commission's assumption that the concept of "interstate communication" is the functional equivalent of "interstate communication service" can be demonstrated by an analysis of the relationship between Section 2(a) and Section 2(b)(1). Section 2(a) provides that the Act "shall apply to all interstate . . . communication by wire" and thereby necessarily excludes from the coverage of the Act intrastate communication by wire. It follows that if, as the Commission held, "intrastate communication service" consists only of that service which is concerned with "intrastate communication", Section 2(b)(1) would be superfluous, since common carrier intrastate communication by wire is excluded by Section 2(a). In other words, the presence of Section 2(b)(1) shows that the draftsmen of the statute recognized that intrastate communication service might involve a transmission of interstate communications and therefore they specifically provided that the service should not lose its intrastate character solely for that reason. In this respect the use of the term "serv-

ice" in Section 2(b)(1), a term that the Commission has disregarded, emphasizes the distinction drawn between the character of the service involved and the nature of the communication that may be transmitted in the service.

This statutory structure reflects a basic purpose of the common carrier provisions of the Act to achieve a balance between local and national regulation rather than to pre-empt local control by virtue of comprehensive federal regulation. Because the potential reach of regulation that relates to any interstate communication is so great, the statutory exceptions to the Commission's jurisdiction are as important a part of the statute as the grants of jurisdiction. The framers of the 1934 Act "attempted . . . to safeguard State regulation . . . ." 78 Cong. Rec. 8823 (1934). Senator Dill, chairman of the Senate Committee that drafted and sponsored the bill stated that when the Act was passed there were

> "many cases in the country where, without some saving clause of that kind [relating to "intrastate telephone business"], the State commissions might be deprived of their power to regulate; and the State commission representatives were jealous, in the preparation of this bill, that those rights should be protected; and we have attempted to do that." *Ibid.*

Thus, as in cases under the Interstate Commerce Act, from which the common carrier provisions of the 1934 Act were drawn, S. Rep. No. 781, *supra* at 2, 5; H.R. Rep. No. 1850, *supra* at 5-6, the statute should be interpreted with due regard for the "Congressional policy of reserving exclusively to the States control over . . . essentially local activities." *Yonkers* v. *United States,* 320 U.S. 685, 690 (1944). For

> "the extension of federal control into these traditional local domains is a 'delicate exercise of legislative policy in achieving a wise accommodation between the needs of central control and the lively maintenance of local institutions.' . . . [Thus, the Supreme Court] has insisted on a 'suitable regard to the principle that

> whenever the federal power is exerted within what would otherwise be the domain of state power, the justification of the exercise of the federal power must clearly appear.' '' *Ibid.*

See also *Duke Power Co.* v. *FPC,* — U.S. App. D.C. —, — F.2d — (decided June 28, 1968).

The Commission's equation of interstate communication with interstate communication service does not even pay lip service to these principles or to the manifest intent of Congress to provide a regulatory plan for communications carriers that would not unduly extend federal control into local matters. On the contrary, its virtual nullification of Section 2(b)(1) disregards existing state regulation of CATV channel service and simply ignores the local problems and local interests that would be affected by federal regulation. The Commission sought to justify this approach to the problem of statutory construction by general references to its "comprehensive regulatory power" and to the necessity for maintaining "the control of the United States over all the channels of interstate and foreign radio transmission." (R. 2863, ¶ 15). These references seem designed to create the impression that in the instant case a strained interpretation of the statute may be justified on the ground of an over-riding national concern with the facilities that are used merely to provide local distribution service to CATV systems. Neither the evidence nor the Commission's own findings on the evidence provides any support for this position.

The primary federal concern underlying Section 214(a) relates to the fiscal integrity of the carriers. The Commission itself recognized this when it observed below that Section 214 protected the public interest by preventing "wasteful or unnecessary" construction. (R. 2863, ¶ 16). The legislative history of the Act, as well as the history and construction of Section 1(18) of the Interstate Commerce Act upon which Section 214(a) was based, plainly reveals that this was the federal interest that prompted the enact-

ment of Section 214.[15] It should be noted that the Commission here did not find or even suggest that the construction and operation of facilities for service to CATV operators create any significant national problem because of its impact upon the financial solvency of communication carriers, upon their ability to perform efficiently their common carrier obligations, or upon the level of their rates.

Allowing state agencies to exercise jurisdiction over local common carrier service to CATV operators would not put in jeopardy any federal interest in the regulation of the operation of CATV systems. In *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 178 (1968), the Court held that the Commission has authority over CATV operations that is "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting." Thus, the Commission's Title III power over CATV operators is secure irrespective of its Title II power over common carriers that is at issue in this case, and the Commission made no findings that its jurisdiction under Section 214 was "reasonably ancillary" to its Title III responsibilities.[16]

Marshalled against this federal interest in regulating CATV channel service are important state interests. In the first place, if the Commission's assertion of jurisdiction under Section 214(a) is upheld the exercise of federal power to grant or to withhold certificates can hardly avoid conflict with the power of state and local governments over such matters as the granting or denying of franchises and the

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[15] Congressman Rayburn in reporting the bill that became the Communications Act of 1934 to the House of Representatives stated that Section 214(a) "is designed to prevent useless duplication of facilities, with consequent higher charges upon the users of the service." 78 Cong. Rec. 10314 (1934). See also 2 Sharfman, The Interstate Commerce Commission 261 (1931); Texas & Pac. Ry. v. Gulf, Etc. Ry., 270 U.S. 266, 277 (1926); Georgia v. United States, 156 F. Supp. 711, 717 (N.D. Ga. 1957), *aff'd*, 356 U.S. 273 (1958), which describe the "national" concern underlying Section 1(18) as pertaining to the sound financial condition of carriers.

[16] The Commission could not indirectly regulate CATV operators generally under its Title II powers over common carriers; less than 10% of CATV operators are dependent upon common carrier services. See p. 4, *supra*.

placement of CATV cables. Thus, local governmental agencies may be ousted of authority to declare where CATV cables may be strung in local communities. For example, if a common carrier applies for and receives Commission approval to run a cable overhead on a residential street, a local governmental agency would be powerless to enforce a general local regulation requiring underground cables. Cf. *New Orleans Term. Co.* v. *Spencer,* 366 F.2d 160, 164 (5th Cir. 1966), *cert. denied,* 386 U.S. 942 (1967); *Scenic Hudson Pres. Conf.* v. *FPC,* 354 F.2d 608, 616 (2d Cir. 1965), *cert. denied,* 384 U.S. 941 (1966).

Secondly, if as the Commission held the Bell System Companies are not engaged in "intrastate communication service," then the Commission, not state and local regulatory bodies, will have jurisdiction over the rates for the CATV channel distribution service here in issue. See *Natural Gas Pipeline Co.* v. *Corporation Commission,* 349 U.S. 44 (1955). But the Act contemplates that state and local regulatory bodies shall have jurisdiction over the rates of service provided solely within a single state. Thus, for example, under Section 2(b)(1) states have exclusive jurisdiction to regulate rates and services between points in a single state, and Section 221(b) gives state or local agencies jurisdiction to set rates for telephone service provided within a single telephone exchange area, even if that area lies in more than one state.[17]

The Commission's assumption that the term "interstate communication service" is a functional equivalent of "interstate communication" would "obliterate the federal-state allocations of regulatory power specified in the Act." *Duke Power Co.* v. *FPC,* — U.S. App. D.C. —, — F.2d —

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17 State and local governments have perceived clearly their interest in the regulation of CATV channel services provided by common carriers, and since the initiation of CATV services all the carriers have been subject to state regulatory control. The Bell System Companies have as a consequence filed tariffs in 44 states concerning these services. In 20 of these states proceedings have been held inquiring into these tariffs, 10 of which have led to formal hearings. (Bell Ex. 1, p. 11, R. 528; Tr. 483-90, 529-30, 564, 595-96).

(decided June 28, 1968).[18] If any deference is to be paid to the legislative history of the Communications Act and if it is to be construed to achieve a "wise accommodation" of federal and state concerns, and with a "suitable regard" for state regulatory power, the assumption should be rejected.

The Commission's error in assuming that any transmission of interstate communication is necessarily an interstate communication service is compounded by its holding that under Section 2(b)(1) the wholly intrastate services and facilities of a common carrier may be deprived of their intrastate character by combining them with the interstate activities of non-common carriers. Section 2(b)(1) reads on common carrier service. It provides *inter alia* that the statute shall not apply to facilities for the intrastate communication service of "any carrier." The language of the section leaves no doubt that it is the character of the *common carrier service and facilities* involved that determines whether a communication service is intrastate or interstate in character. This reading of the section is confirmed by the fact that Section 2(b)(2), which provides an explicit but limited exemption for any common carrier who is subject to the Act "solely through physical connection with facilities" of another common carrier, does so in terms directed solely to common carrier services and facilities.

The decisions interpreting and applying the provisions of the Interstate Commerce Act demonstrate the error of both the Commission's assumption that every communications service that transmits interstate communications is necessarily an interstate communication service and of its holding that for the purpose of determining whether

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[18] The Commission's decision that any service which carries interstate communications is an interstate service is similar to holding under the Federal Power Act that the "cord from a light plug to a toaster on the breakfast table is a facility for transmission of interstate energy if any part of the load is generated without the state." Connecticut Light & Power Co. v. FPC, 324 U.S. 515, 529 (1945). The courts have rejected such an unwarranted extension of Federal power into the domain of state regulation. See *e.g.*, Duke Power Co. v. FPC, — U.S.App.D.C. —, — F.2d — (decided June 28, 1968).

a communications service is intrastate in character, within the meaning of Section 2(b)(1), intrastate common carrier facilities and services may be combined with the interstate activities of non-common carriers. Under that Act the Supreme Court has held that when the only common carrier service involved in the transportation of goods is rendered wholly within a single state the service is "intrastate service" even though the goods transported are moving to or from points in other states. *Pennsylvania R.R.* v. *Public Utilities Commission,* 298 U.S. 170 (1936). In that case coal mined in Pennsylvania was transported on a coal company's railroad cars and barges to Ohio, where it was loaded upon a railroad common carrier for distribution within that state. The appellant in the Supreme Court argued in a manner reminiscent of the Commission's decision here that the service provided by the carrier within Ohio was an interstate service since (298 U.S. at 173)

> "from the moment the coal left the mines in Pennsylvania there was a continuing intention to deliver it to consumers in another state. . . ."

Mr. Justice Cardozo, writing for a unanimous court, rejected that argument and held "the transportation of the coal . . . in the same state, was an intrastate service, not subject to the provisions of the Interstate Commerce Act. . . . " 298 U.S. at 173. The argument to the contrary the Court regarded as "a confusion of thought" (*id.* at 174):

> "Not all commerce is transportation, and not all transportation is by common carriers by rail. The question for us here is not whether the movement of the coal is to be classified as commerce or even as commerce between the states. The question is whether it is that particular form of interstate commerce which Congress has subjected to regulation in respect of rates by a federal commission."

The Court concluded (*id.* at 175):

> "Appellants would have us hold that this interstate transportation by an owner who does not carry for any one else will be tacked to the intrastate transporta-

> tion by railroads who are in business as common carriers, and the movement thus consolidated brought within the statute. The statute and the decisions as we read them forbid this unifying process."

The careful delineation which Mr. Justice Cardozo made between "commerce" and "transportation" is precisely the kind of distinction that the Communications Act draws between "communication" and "service." "Interstate commerce" sets the constitutional limits upon regulation under the Interstate Commerce Act just as "interstate communication" defines the limits of the application of the Communications Act. But service wholly within a single state, when there is no common carriage across state lines, is "intrastate service," even though the subject matter of that service may itself be regarded as interstate commerce or interstate communication.

Pennsylvania R.R. v. *United States,* 242 F. Supp. 890 (E.D. Pa. 1965), *aff'd,* 382 U.S. 372 (1966), reaffirms the doctrine of *Pennsylvania R.R.* v. *Public Utilities Commission, supra.* In that recent case the operations within a single state of motor carriers who received goods from and transferred them to private carriers who crossed state boundaries were held not to be subject to the Interstate Commerce Act. The Interstate Commerce Commission reasoned that (94 M.C.C. 541, 550 (1964))

> "the transportation must be considered as beginning at the point where the shipper tenders his goods to a for-hire carrier. If delivery is then made at a point in the same State, the relevant transportation is not interstate transportation."

This reasoning was adopted by the court that affirmed the Commission's decision. 242 F. Supp. at 891.[19]

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[19] Cf. Pennsylvania R.R. v. Pittsburgh, L. & W. R.R., 83 F.2d 861 (6th Cir.), *cert. denied,* 299 U.S. 572 (1936); New York Cen. R.R. v. Southern Ry., 226 F. Supp. 463 (N.D. Ill.), *aff'd,* 338 F.2d 667 (7th Cir. 1964), *cert. denied,* 380 U.S. 954 (1965), holding that under Section 1(18) of the Interstate Commerce Act extension of service by a common carrier railroad over private transportation facilities is not an "extension" of the railroad's line.

The Commission attempted to distinguish *Pennsylvania R.R.* v. *Public Utilities Commission, supra,* on the ground that the transportation by the owner of the coal was not subject to the Interstate Commerce Act, whereas in the instant case both broadcasters and CATV operators are subject to the jurisdiction of the Commission. This discussion is irrelevant because it bears no relation to the actual holding in *Pennsylvania R.R.* v. *Public Utilities Commission, supra.* The basis of the Court's holding there was that the transportation by the coal owner was not common carrier transportation and hence could not be combined with the common carrier transportation of railroads for jurisdictional purposes.[20] In this respect the coal owner was in exactly the same position as the broadcasters and CATV operators in the instant case. Nothing in the Court's opinion suggests that the result would have been otherwise if the coal owner, although not regulated as a common carrier, had been subject to other regulation under the Interstate Commerce Act, as private motor carriers, for example, are under 49 U.S.C. § 304(a)(3). And indeed in *Pennsylvania R.R.* v. *United States,* 242 F. Supp. 890 (E.D. Pa. 1965), *aff'd,* 382 U.S. 372 (1966), the private motor carriers involved were subject to this provision of the Interstate Commerce Act, but the court nevertheless applied the doctrine of *Pennsylvania R.R.* v. *Public Utilities Commission, supra.*

Furthermore, there is no warrant for the Commission's suggestion that the case can be distinguished on the ground that by combining the transportation of the coal owner with that of the railroad, the coal owner would have been brought within the scope of the Interstate Commerce Act, whereas in the instant case combining the interstate transmission of the broadcasters with the intrastate carriage by common carriers does not bring within the scope of the Communications Act conduct that would otherwise be exempt. The

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20 This was the point of the passage at 298 U.S. p. 176, that the Commission cited to support its asserted distinction, in which the Court said that transportation by common carrier could not be combined with carriage by an owner for the purpose of subjecting the whole to the operation of the statute "when the parts would be exempt."

issue in *Pennsylvania R.R.* v. *Public Utilities Commission, supra,* was whether the switching charges imposed by two railroad companies were subject to regulation under the Interstate Commerce Act or under a regulatory statute of Ohio—not whether the owner of the coal was subject to regulation under the Interstate Commerce Act. A decision upholding the jurisdiction of the Interstate Commerce Commission over the railroads would not have subjected the coal owner's transportation of his own private property to regulation under the Interstate Commerce Act and nothing in the opinion of the Court suggests the contrary.

The authorities specifically relied upon by the Commission to justify its disregard of *Pennsylvania R.R.* v. *Public Utilities Commission, supra,* are not persuasive. In *Ward* v. *Northern Ohio Tel. Co.,* 300 F.2d 816 (6th Cir.), *cert. denied,* 371 U.S. 820 (1962), the Court held only that a telephone company that furnishes common carrier service to connect a broadcasting studio with a broadcasting antenna is subject to Sections 201-205 of the Act. *Ward* cannot therefore be regarded as a considered decision on the question whether for the purposes of jurisdiction under Section 214(a) intrastate common carrier service can be combined with the broadcasting activities of a non-common carrier. That case raised no issue with respect to the application of Section 214(a) or its relationship to Section 2(b)(1).

As the summary of the arguments of counsel in *Ward* shows (300 F.2d at 820), the court was not called upon to consider whether there was any distinction between interstate communication service and the mere transmission by intrastate facilities of interstate intelligence. The court rested its opinion on the ground that although the telephone company was a "connecting carrier" it was, by the specific provisions of Section 2(b)(2), subject to Sections 201-205. See 300 F.2d at 820-21.[21] In so holding the court neces-

[21] The court stated the issue before it as "whether a telephone company, with all of its facilities located in one state, engaging only in intrastate telephone communication except for physical connections with carriers in other states, is subject to federal statutes requiring it to furnish telephone lines to radio stations broadcasting across state boundaries." 300 F.2d at 818.

sarily assumed that the telephone company's own service was intrastate in character since the Act defines a "connecting carrier" as one engaged in interstate communication "*solely*" through connection with the facilities of another non-affiliated common carrier. Section 2(b)(2)(3) and Section 3(u). Furthermore, the court in *Ward* relied heavily upon the opinion of the Commission in *Capital City Telephone Co.*, 3 F.C.C. 189 (1936), which turned upon Section 202(b) of the Communications Act. That section relates solely to charges for or services in connection with the use of wires in chain broadcasting or incidental to radio communication and has nothing to do with facilities.

The other major precedent cited by the Commission was *Idaho Microwave, Inc.* v. *FCC*, 122 U.S. App. D.C. 253, 352 F.2d 729 (1965). At issue in that case was the grant of a construction permit for the erection of microwave common carrier facilities to transmit a television signal from one point in Idaho to another point for subsequent service to CATV facilities within that state. Such a permit is required by Section 319 of the Act (47 U.S.C. § 319), and therefore presents a Title III question dealing with radio transmission. The Commission granted the construction permit on the condition that the microwave common carrier conform to the Commission's "non-duplication rule," and this Court upheld that condition. In so doing, it made the following statement (352 F.2d at 732):

> "[T]hough Idaho Microwave's physical facilities are located within Idaho, it performs an interstate communication service when it takes part in the transmission of signals from Utah to Idaho."

It is upon this language that the Commission relied in reaching its determination of the Section 2(b)(1) issue in this case. However, there was not properly before the Court in *Idaho Microwave* any Section 2(b)(1) issue. The application of Section 301 (and with it the related sections of Title III) is explicitly not affected by the limitations

contained in Section 2(b). Thus, since *Idaho Microwave* involved solely a Section 319 issue concerning the construction of a radio facility, there was no occasion for the Commission or the Court to pass upon the nature of the communication service offered by Idaho Microwave.[22]

Idaho Microwave is distinguishable in another regard. The common carrier in that case did not distribute CATV signals among the CATV operator's customers, as the carriers do here. Instead, Idaho Microwave delivered a signal to the CATV distribution system. The distinction between these two kinds of service has long been recognized as a watershed between national and local concerns. Thus, in *East Ohio Gas Co.* v. *Tax Comm'n,* 283 U.S. 465, 470-71 (1931), it was held that the intrastate transmission of out-of-state gas at high pressure to connections with local distribution systems is "essentially national—not local—in character" and is therefore not subject to state regulation. But the transmission of gas within the local distribution systems is "business of purely local concern exclusively within the jurisdiction of the State." See also *FPC* v. *Southern Calif. Edison Co.,* 376 U.S. 205 (1964); *United States* v. *Public Utilities Commission,* 345 U.S. 295, 303 (1953); *Brosious* v. *Pepsi-Cola Co.,* 155 F.2d 99 (3d Cir. 1946).[23]

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[22] That no Title II issue concerning the "public convenience and necessity" was involved in *Idaho Microwave* can be seen from the decision in Carter Mountain Trans. Corp. v. FCC, 116 U.S.App.D.C. 93, 321 F.2d 359 (1963), upon which *Idaho Microwave* relied in upholding the Commission's power to attach non-duplication conditions to the licensing of microwave facilities. 352 F.2d 729, 733. *Carter Mountain* held that "in carrying out its obligations under Section 307(b) . . . the Commission may weigh the net effect on the community . . . to be served." 321 F.2d at 363. Thus, the broad power to regulate microwave relay in *Carter Mountain* and in *Idaho Microwave* arose out of the Commission's Title III responsibilities, which are not, of course, limited by Section 2(b)(1).

[23] The Commission also cited Pacific Telatronics, Inc., 37 F.C.C. 1163 (1964), as supporting its construction of Section 2(b)(1). But that case rested upon Section 202(b):

> "Charges or services, whenever referred to in this chapter, include charges for, or services in connection with, the use of common carrier

Ward is similarly distinguishable, since the carrier in that case was not providing the kind of local distribution service that is at issue here.

In holding that the common carriers in the instant proceeding are furnishing interstate communication service and therefore are operating "facilities" that are subject to the Commission's jurisdiction under Section 214, the Commission improperly assumed that any communication service that carries interstate communication is an interstate communication service. It neglected the teaching of the Supreme Court in *Pennsylvania R.R.* v. *Public Utilities Commission, supra,* ignored the structure and the basic purpose underlying Title II of the Communications Act, and relied upon authority that is clearly distinguishable. Accordingly, the Commission erred in reaching its conclusion on this issue and its order should not be enforced.

III. THE COMMISSION ERRED IN HOLDING THAT THE SPECIFIC EXEMPTIONS SET FORTH IN SECTION 214(a) DO NOT APPLY TO THE COMMON CARRIER LINES USED TO PROVIDE SERVICE TO CATV OPERATORS

Section 214(a) provides in pertinent part:

> "No carrier shall undertake the construction of a new line or of an extension of any line, or shall acquire or operate any line, or extension thereof, or shall engage in transmission over or by means of such additional or extended line, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such addi-

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lines of communication, whether derived from wire or radio facilities, in chain broadcasting or incidental to radio communication of any kind."

Pacific Telatronics construed this provision to mean that all service which is "incidental to radio communication" is interstate service, since radio communication is interstate communication. This construction of Section 202(b) is merely a variant of the Commission's error in this case: interstate communication equals interstate service. Moreover, it is clear that Section 202(b) has no impact upon the Commission's jurisdiction to regulate "facilities."

> tional or extended line: *Provided,* That no such certificate shall be required under this section for the construction, acquisition, or operation of (1) a line within a single State unless such line constitutes part of an interstate line, (2) local, branch, or terminal lines not exceeding ten miles in length, or (3) any line acquired under section 221 or 222 of this title: . . . As used in this section the term 'line' means any channel of communication established by the use of appropriate equipment, other than a channel of communication established by the interconnection of two or more existing channels . . . ."

The Commission erred in rejecting the contention of the Bell System Companies that their CATV channel service facilities were covered by the exceptions in Section 214(a)(1) and (2).[24]

A. The Commission Erred in Holding That the Common Carrier Lines Used for CATV Service Were Parts of Interstate Lines and, Therefore, Were Not Covered by Section 214(a)(1)

The Companies contended before the Commission that the cable used to provide service for CATV operators is a line within a single state and does not constitute "part of an interstate line" within the meaning of Section 214(a)(1). Underlying this contention were the undisputed facts that there are no Bell System Company common carrier lines crossing state boundaries that connect to the common carrier lines used for CATV service, that all of the Companies' lines used for this service lie wholly within single states and that neither broadcasters nor CATV operators are common carriers. See p. 17, *supra.*

In rejecting this contention, the Commission relied upon the definition of "line" as set out in Section 214(a)—"any

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[24] The Companies also contend that the Commission erred in holding that the facilities were not covered by Section 221(b) of the Communications Act which exempts from regulation facilities for "telephone exchange service", even though a portion of the exchange service involves interstate communication, in any case where such matters are subject to state or local regulation. This issue will be argued in the briefs of other petitioners and appellants in this consolidated proceeding and will not be discussed herein.

channel of communication established by the use of appropriate equipment . . . .'' It held that a broadcast signal constituted an ''interstate channel of communication'' and that, since the CATV local distribution system is only a ''link in the transmission of the signal to the television set of the viewer,'' it is part of that interstate channel of communications and thus of an interstate line. (R. 2865, ¶ 18). This reasoning rests on the assumption that in the phrase ''part of an interstate line'' in Section 214(a)(1) the words ''interstate line'' are not confined to a common carrier line but can be read as including a line that consists in part of common carrier facilities and in part of non-common-carrier facilities. This reasoning led the Commission to reject the argument that it was impermissible to combine common carriage communication facilities with private carriage facilities for the purpose of subjecting the common carrier lines to the operation of Section 214(a). See *Pennsylvania R.R.* v. *Public Utilities Commission,* 298 U.S. 170 (1936), and pages 24-26 above.

The Commission's reading of Section 214(a)(1) is strained and arbitrary because it requires that in the phrase ''part of an interstate line'' the word ''line'' be given a meaning different from the meaning that it bears elsewhere in Section 214(a). The initial clause of Section 214(a) provides, in effect, that no carrier shall construct, extend, acquire, or operate any ''line'' until it shall first have obtained a certificate of public convenience and necessity. The word ''line'' in this passage cannot reasonably be read as covering anything except common carrier facilities. No court—and not even the Commission in this case—has suggested that this provision requires a carrier to obtain a certificate for the construction or operation of facilities that were not intended to be used for common carriage as, for example, a facility that was used by the carrier exclusively for its own internal purposes or that was constructed for sale to another for his private use. Any wider reading of the word ''line'' in this part of Section 214(a) would be inconsistent with the section's legislative

history which shows that its purpose was solely to prevent the wasteful duplication of common carrier facilities which might result in the imposition of higher charges upon the users of common carrier service.[25]

This reading of the general provisions of Section 214(a) is in no way inconsistent with the definition of "line" contained in the section. As the words of the definition indicate, it was not intended to extend the requirement of certification to private facilities but was simply directed to the question of the types of transmission facilities that were encompassed in the word "line". This is plainly demonstrated by the legislative history of the definition. When Section 214(a) was first enacted in 1934 it contained no definition of the term "line". Because of this omission questions arose concerning the jurisdiction of the Commission under Section 214 with respect to certain types of transmission facilities that might be used by common carriers. In 1942 certain carriers urged that a definition of "line" be added to the statute and that the term be defined so as to relate solely to transmission by wire or cable.[26] The Commission resisted this proposal on the ground that technological development, *e.g.*, radio, made it appropriate to encompass within the definition means

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[25] Section 1(18) of the Interstate Commerce Act, upon which Section 214(a) was based, was concerned solely with preventing the construction of potentially unprofitable railroad common carrier lines that could become a burden to the customers using those lines. H.R. Rep. No. 456, Committee on Interstate and Foreign Commerce, 66th Cong., 1st Sess. p. 18 (1919); 58 Cong. Rec. 8316 (1919) (remarks of Congressman Esch); 59 Cong. Rec. 748-50 (1919) (remarks of Senator Cummings). Section 214 had precisely the same purpose, see Hearings on H.R. 8301 before the Committee on Interstate and Foreign Commerce, House of Representatives, 73d Cong., 2d Sess. p. 172 (1934); 78 Cong. Rec. 10314 (1934), and the Commission itself has so held. Mackay Radio, Inc., 6 F.C.C. 562, 572-73 (1938).

[26] Hearings on S. 2445, before a subcommittee of the Committee on Interstate Commerce, U.S. Senate, 77th Cong., 2d Sess. pp. 72-75, 104, 117 (1942); Hearings on S. 2598 before a subcommittee of the Interstate and Foreign Commerce Committee, House of Representatives, 77th Cong., 2d Sess. pp. 34, 53, 56, 77 (1942).

of transmission that were broader than merely wire and cable.[27]

There was no suggestion at any point in the hearings, the legislative reports or the debates on the floor of Congress that the definition of the word "line" did more than deal with this problem. The evidence shows that the intent of Congress in framing the definition was simply to make it plain that the "lines" of common carriers subject to Section 214(a) were not confined to physical wires and cables. See 89 Cong. Rec. 777 (1943) (remarks of Congressman Wadsworth); *id.* at 1093 (1943) (remarks of Senator McFarland). Indeed the sponsor of the 1943 Amendments in the Senate stated that "the definition conforms in substantial degree with the definition heretofore exercised by the Commission." *Ibid.*[28] This legislative history requires the rejection of any suggestion that by adding the definition of "line" to the statute in 1943 Congress for the first time extended the coverage of Section 214(a) so as to authorize the Commission to require certificates for non-common-carrier lines.

It follows from what has been said above that in interpreting Section 214(a) it is necessary to proceed from the

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27 See the statement of Commissioner Durr in Hearings on S. 2598 before a subcommittee of the Interstate and Foreign Commerce Committee, House of Representatives, 77th Cong., 2d Sess. p. 184 (1942):

> "[T]elephone communication is established not only by physical wires, but also by means of superimposing on existing wires, additional channels of communication by certain equipment, such as that which is known as carrier current systems . . . . Moreover, of necessity, the language in the act must be broad and comprehensive . . . . For example, the development of the art in both telephone and telegraph may result in changes which we cannot now specify. Thus, should radio telephony be more generally used in the future, then of what use would it be if the act covers only abandonment of physical wires."

28 The term "channel of communication" was probably chosen because the Commission had previously used a similar term—"communication channel"—in holding a segment of common carrier line in one state was part of an interstate common carrier line in that the segment could be mechanically linked to the main line. Southwestern Bell Tel. Co., 6 F.C.C. 529, 533 (1938).

premise that the requirements of the section apply only to common carrier lines and accordingly that in the opening clause of Section 214(a), which states the basic regulatory scope of the section, the word "line" means a common carrier line. Since this is the meaning that the word conveys in the basic provision of Section 214(a) it would be irrational to read the word as conveying a different and expanded meaning in subsequent clauses that are simply designed to implement or to limit the basic regulatory authority conferred. Thus, in Section 214(a)(1) itself the opening phrase "a line within a single state" must give the word "line" the same meaning that it bears in the opening clause of Section 214(a), *i.e.*, a common carrier line, and there can be no rational justification for an assertion that in the final clause—within the space of a dozen words—"line" changes in meaning and denotes an interstate "line" that is a combination of common carrier and non-common-carrier lines.

The Commission's misreading of Section 214(a)(1) is another manifestation of its error in assuming that for purposes of interpreting the Communications Act the concept of interstate communication is the absolute equivalent of interstate communication services. See pp. 18-24, *supra*.[29] It is this misconception that has led the Commission to conclude that a wholly intrastate common carrier line is "part" of an interstate line merely because it re-

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[29] The legislative history of Section 214(a)(1) shows that "interstate line" was not intended to denote every line capable of conveying an "interstate communication." The Interstate Commerce Commission recommended to the Congressional Committee holding hearings on the bill that became the Communications Act of 1934 that Section 214(a)(1) either be eliminated or be qualified to apply only to lines used solely for intrastate communications. Hearings on S. 2910, before the Committee on Interstate Commerce, U.S. Senate, 73rd Cong., 2d Sess. p. 207 (1934). These recommendations were functional equivalents, since Section 214(a), like all the other provisions of Title II, applies only to interstate communication and, therefore, lines used solely for intrastate communication are not subject to that Section without regard to Section 214(a)(1). These recommendations were rejected.

ceives from non-common-carriers communications that have an interstate origin.[30]

And just as its error under Section 2(b)(1) led the Commission to disregard the balance between national and local interests, so too here the Commission's error with respect to Section 214(a)(1) led it to ignore the distinction that Congress drew in that section between national and local concerns. The statute manifests a federal interest in regulating all parts of interstate common carrier lines while leaving to the states regulatory power over wholly intrastate common carrier lines. In other words, the Congressional purpose to regulate parts of interstate common carrier lines, even though lying within single states, was simply ancillary to its purpose to regulate common carrier lines that cross state boundaries. Nothing supports the Commission's view that Congress intended to require certificates of public convenience and necessity for intrastate common carrier lines merely because those lines are used to carry interstate communications from other facilities, such as broadcasts, which themselves are not subject to the Commission's jurisdiction under Section 214(a). In fact, to subject intrastate common carrier lines to Section 214(a) merely because of their relationship to interstate communication facilities that Congress intentionally did not choose to regulate under Section 214(a) is to invert the Congressional intent.

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[30] Just as under Section 1(18) of the Interstate Commerce Act the extension of service by a common carrier railroad over private transportation facilities is not an "extension" of the railroad's line, so here the CATV common carrier facilities are not a part of a line that includes a non-common-carrier broadcast signal. See Pennsylvania R.R. v. Pittsburgh, L. & W. R.R., 83 F.2d 861 (6th Cir.), *cert. denied*, 299 U.S. 572 (1936); New York Cen. R.R. v. Southern Ry., 226 F. Supp. 463 (N.D. Ill.), *aff'd*, 338 F.2d 667 (7th Cir. 1964), *cert. denied*, 380 U.S. 954 (1965).

B. The Commission Erred in Holding That the Distribution Lines Used by the Petitioner to Furnish Service to CATV Operators Are Not "Local, Branch, or Terminal Lines" Within the Meaning of Section 214(a)(2)

Even if it is assumed *arguendo* that the common carrier lines used for CATV service are not exempt under the provisions of Section 214(a)(1) the Commission erred in holding that they were not exempt under Section 214(a)(2) which provides that no certificate is required for the construction, acquisition or operation of

> "local, branch, or terminal lines not exceeding ten miles in length."

The Companies argued before the Commission that the feeder and distribution cable and the drop-lines used to transmit CATV signals from the headend to the subscribers' premises were "local, branch, or terminal lines" within the meaning of this provision. The Commission rejected this contention, holding that the feeder and distribution cable, and possibly the drop-lines as well, were "main" communication lines and should have been certificated under Section 214(a).[31]

The facts support the contention of the Companies that their CATV service facilities are "local, branch, or term-

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[31] The Commission's position on the drop-lines is unclear. Its decision of June 26, 1968, did not distinguish between the drop-lines on the one hand and the feeder and distribution cable on the other, but appeared to treat them collectively. In its order of July 5, 1968, granting a limited stay of the cease and desist order, the Commission stated "Our decision did not intend to prohibit the provision of 'drops'" where feeder and distribution cables were already in operation. (R. 2906). In a subsequent order of September 7, 1968, dealing with a petition for reconsideration and for special relief filed by Warrensburg Cable, Inc., the Commission stated ". . . we do not think that a Section 214 certificate would be required every time a subscriber for a CATV system which leases channel service from a carrier either commences or terminates CATV service. The authorization of drops would be implicit in any Section 214 authorization of the trunk and feeder cable." This statement can be read as meaning that drop-lines are not covered by the exemption in Section 214(a)(2) but require authorization which may be implied from the authorization of feeder and distribution cable. The status of drop-lines must, therefore, be left in the obscurity in which the Commission has chosen to envelop it.

inal lines." The lines by which the Companies furnish CATV service are channels of communication from the headend of a CATV system to terminals on the premises of patrons of the system. Both the headend and the patrons are always located in a single community, and the lines used to connect them are therefore local in character. This is necessarily so because of the physical limitation on the distance, approximately 12 miles, which television signals can be satisfactorily transmitted over coaxial cable at the frequencies that can be used by regular television receivers. (Bell Ex. 2, pp. 17, 22, R. 546, 551; Tr. 616-22). The lines cover a relatively small and compact area within a local telephone exchange area and begin and end within an exchange. (Bell Ex. 1, pp. 10-11, R. 527-28; Tr. 376, 379, 381-90, 519, 562, 665). In most instances the lines are located in only a small part of the exchange area in which the CATV system served is located. (See Maps in CATV T.F. Ex. 2, R. 1011; Tr. 382).

In no case does a Bell System Company transmit a CATV signal more than 10 airline miles from the headend. (Bell Ex. 2, p. 22, R. 551). There are instances, however, in which the cable required to connect the headend with the premises of a particular customer may exceed 10 miles in length because the amount of cable required to effect the connection will depend upon circumstances such as the nature of the terrain or the existence of obstacles. And, of course, within any particular community the total cable required to connect all subscribers within a 10 mile radius of the headend, when aggregated, will exceed 10 miles.[32]

The significance of these facts should be appraised in the light of the Commission's insistence that the CATV

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[32] For example, in the CATV distribution system in Marion, Indiana, the feeder cable branches at 56 points, it distributes at 180 separate locations and there are drop-lines at 3,025 locations. (CCB Ex. 2, R. 1486). This explains Commission findings like that involving the system in Marion, Indiana, where 41.6 miles of feeder and 131.4 miles of distribution cable are utilized. (R. 2867, ¶ 22). The Commission did not, however, find or even suggest that these aggregate mileage figures should be used to determine the application of the 10 mile limitation in Section 214(a)(2). (R. 2867, n.21).

service facilities are "part" of an interstate communication line that consists of a broadcast signal emanating from a broadcaster in a distant community and is picked up by the antenna of the CATV operator. For reasons that have been stated at pages 32-37, *supra,* we submit that this contention is erroneous. But if it is assumed *arguendo* to be sound then surely the interstate communication channel that transmits the signals interstate between communities is the "main" line of the entire communication system and the lines whose only function is to connect the headend of the CATV operator in a particular community with the premises of subscribers in that community are "local, branch, or terminal lines" of that main line. Thus, the very argument the Commission made to deny the Companies' exemption under Section 214(a)(1), if sound, supports the conclusion that their CATV facilities are exempt under Section 214(a)(2).

This application of the words of Section 214(a)(2) is supported by pertinent authorities dealing with the meaning of the word "local" as applied to comparable transportation or communication facilities. Thus, in *FPC* v. *East Ohio Gas Co.,* 338 U.S. 464, 469-70 (1950), the Court in commenting on the provision in the Natural Gas Act that exempts from regulation facilities used for "the local distribution of natural gas" said:

> "But what Congress must have meant by 'facilities' for 'local distribution' was equipment for distributing gas among consumers within a particular local community, not the high-pressure pipe lines transporting gas to the local mains."

See also *Omaha Street Ry.* v. *ICC,* 230 U.S. 324, 336 (1913) ("local" railroad); *Gillette* v. *Rockland Coaches, Inc.,* 142 F.2d 616 (2d Cir. 1944) ("local" motor bus carrier); *Courier Post Pub. Co.* v. *FCC,* 70 U.S. App. D.C. 80, 104 F.2d 213 (1939) ("local" broadcast station).

The passage in the Commission's decision rejecting the Companies' contention that their CATV lines are covered by Section 214(a)(2) embodies two notions that the Com-

mission sought to justify by reference to *Texas & Pac. Ry.* v. *Gulf, Etc. Ry.*, 270 U.S. 266, 278 (1926), which construed Section 1(22) of the Interstate Commerce Act. One is that the exemption is limited to "minor additions or improvements to existing facilities or services" which are designed to improve the facilities of existing customers or to supply existing services to others who are entitled to receive them. The other notion is that a line is not covered by the exemption unless its cost is "small". (R. 2866, ¶ 21). It is not clear whether the Commission regarded each of these notions as an independent substantive ground for its decision. The Commission's discussion, however, suggests that it placed primary emphasis on the finding that the lines considered collectively involved "substantial outlays of funds." (R. 2867, ¶ 22). On any view of its reasoning the Commission ignored the terms of Section 214(a)(2) and both misread and misapplied the decisions of the courts under Section 1(22) of the Interstate Commerce Act.

By choosing to base its holding upon a sentence in *Texas & Pac. Ry.* directed to Section 1(22) of the Interstate Commerce Act, the Commission has shown a curiously eclectic attitude toward that statute. In dealing with the question whether the Commission is entitled to enforce the provisions of Section 214(a) by a cease and desist order, the Commission chose to ignore the provisions of the Interstate Commerce Act and the decisions interpreting and applying those provisions in spite of the fact that so far as concerns that question the provisions of the Interstate Commerce Act are substantially identical to those of the Communications Act.[33] In dealing with Section 214(a)(2), however, the Commission has chosen to rest its decision entirely on language from an opinion that construes and applies Section 1(22) of the Interstate Commerce Act despite the fact that there are substantial and significant differences between the language of that section and the language of Section 214(a)(2).

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[33] It similarly disclaimed the applicability of law under the Interstate Commerce Act when considering Section 2(b)(1).

Section 1(22) of the Interstate Commerce Act exempts "spur, industrial, team, switching or side tracks" located wholly within one state. Those terms are narrower in meaning than the terms "local, branch, or terminal lines". Decisions under Section 1(22) show that a line is not exempt merely because it is local in the sense that it provides service within a single local community. *Union Pac. R.R.* v. *Denver & R. G., W.R.R.*, 198 F.2d 854 (10th Cir. 1952). "Branch" lines clearly are not relieved of the certification requirements of Section 1(18) by Section 1(22). *Texas & Pac. Ry.* v. *Gulf, Etc. Ry.*, 270 U.S. 266, 276 (1926). And "terminal" lines as such are not covered by Section 1(22). *ICC* v. *Memphis Union Station Co.*, 360 F.2d 44, 51-52 (6th Cir.), *cert. denied*, 385 U.S. 830 (1966).

The words of the two statutory provisions therefore indicate that in Section 214(a)(2) Congress provided exemptions in terms broader than those used in Section 1(22) of the Interstate Commerce Act. This reading of Section 214(a)(2) is strengthened by the fact that Congress added to that section an additional limitation not found in Section 1(22); that is, that the lines must not exceed 10 miles in length. This distance limitation is in itself an indication that Congress recognized that the terms "local, branch, or terminal lines" were sufficiently broad to require a qualification that is not necessary when dealing with spur, industrial, team, switching or side tracks in the railroad industry.

The significance of the difference between the words of Section 214(a)(2) and the words used in Section 1(22) might have been more apparent to the Commission if it had not chosen to dismiss the legislative history of Section 214 (a)(2) as throwing "little light" on its purpose. Section 214(a)(2) was added to the original bill that became the Communications Act at the suggestion of the president of Western Union. Senate Hearings, 1934, *supra*, p. 104. At the same time Section 221(b) was also enacted. The latter section exempts facilities constructed and operated for or in connection with telephone exchange service. Telephone

exchange service, even if in some instances provided across a state line, is provided within a single local area. The reasonable inference from this legislative history is that Section 214(a)(2) was designed, by virtue of the 10 mile limitation, to provide a general exemption for communication facilities whose local character was substantially similar to the local character of exchange facilities. Viewed in this light the Congressional purpose cannot be regarded as directed to communications lines that are simply the equivalent of "spur, industrial, team, switching or side tracks" in the railroad industry, but on the contrary, is intended to exempt from certification all lines whose function is essentially local in character.

Apart from the differences between Section 214(a)(2) and Section 1(22) of the Interstate Commerce Act the Commission did not properly understand or apply the cases decided under the latter section. The particular passage in the opinion in *Texas & Pac. Ry.* v. *Gulf, Etc. Ry.*, 270 U.S. 266, 278 (1926), upon which the Commission relied did not, when read in context, lay down an absolute and mechanical rule of law for determining when a railroad line fell within Section 1(22). Thus the Court did not hold in that passage that a track could never be a spur, industrial, team, switching or side track unless it was constructed merely to improve facilities required by shippers already served by the carrier or to supply the same service already supplied to others to someone who was entitled to demand the service. In referring to such facilities the Court was merely adducing examples of trackage that would be covered by Section 1(22). But the passage in which this statement occurs shows that the Court did not regard this description of facilities as all-inclusive or as laying down any test that was in all circumstances decisive. On the contrary, in the same passage the Court indicated that the basic test was directly related to the question of statutory purpose and policy. Thus the Court said (270 U.S. at 278):

> "But where the proposed trackage extends into territory not theretofore served by the carrier, and particularly where it extends into territory already served by

> another carrier, its purpose and effect are, under the new policy of Congress, of national concern."

That this was the basis of the Court's reading of Section 1(22) is demonstrated by the earlier passage in its opinion in which it said that the true "guide to the meaning of the terms extension and industrial track, as used in paragraphs 18 to 22, is furnished by the context and by the relation of the specific provisions here in question to the railroad policy introduced by Transportation Act, 1920." 270 U.S. at 277. The Court then observed that in the Act Congress recognized that the preservation of the earning capacity and conservation of the financial resources of individual carriers was a matter of national concern, that the building of unnecessary lines involves a waste of resources, that the burden of this waste may fall upon the public, and that competition between carriers may therefore result in harm to the public.

In accordance with the doctrine laid down in *Texas & Pac. Ry.* v. *Gulf, Etc. Ry., supra,* the courts in subsequent decisions have held that a comprehensive functional analysis is required to determine whether a line falls within Section 1(22). That analysis gives appropriate consideration to all relevant matters, including the nature of the service the line provides and its cost. See *e.g., United States* v. *Idaho,* 298 U.S. 105, 109 (1936); *Georgia So. & F. Ry.* v. *Atlantic Coast Line,* 373 F.2d 493, 498 (5th Cir.), *cert. denied,* 389 U.S. 85 (1967). But nothing in these decisions suggests, as the Commission seems to believe, that to qualify for exemption under Section 1(22) a line must provide precisely the same kind of service that the carrier has provided to the shipper in the past or is providing to other shippers similarly situated. On the contrary, the one factor that is given predominant importance in the analysis is whether the line extends into new territory that is already being served by another carrier and is therefore likely to have an adverse economic effect upon the operations of that carrier. *Missouri Pac. R.R.* v. *St. Louis S.W. Ry.,* 73 F.2d 21 (8th Cir. 1934); *Georgia* v. *United States,* 156 F. Supp. 711, 715 (N.D. Ga.

1957), *aff'd,* 356 U.S. 273 (1958); *New York Central R.R.* v. *Norfolk & Western Ry.,* 214 F. Supp. 549, 553 (S.D. W. Va. 1963). The importance that the courts give to the economic consequence of proposed construction is strikingly illustrated in *Chicago, R. I. & Pac. R.R.* v. *Thompson,* 135 F. Supp. 43 (E.D. Ark. 1955), which held that no Section 1(18) certificate would be required for the construction of a line by the railroad located most conveniently to a new industrial district, although a second railroad would need such a certificate, since it would have an adverse impact on the first carrier's future revenues.

The Commission's error is demonstrated by the heavy and perhaps decisive importance it gave to the question of cost. In the comprehensive functional analysis that is required to determine whether a line falls within Section 1(22), cost is merely one of several relevant considerations and is by no means decisive. Thus, the courts have held lines to be "spurs" within Section 1(22) even though their cost is substantial by the standards that the Commission has applied here. *Pennsylvania R.R.* v. *Reading Co.,* 132 F. Supp. 616 (E.D. Pa.), *aff'd,* 226 F.2d 958 (3d Cir. 1955) (total cost to the carrier approximately $770,000); *Chicago, M., St. P. & P. R.R.* v. *Chicago & E.I. R.R.,* 198 F.2d 8 (7th Cir. 1952) (total cost to carrier between $315,000 and $500,000). Conversely a track has been held to be an extension even though its cost was small. *New York Central R. R.* v. *Norfolk & Western Ry., supra* (total cost to carrier approximately $16,000).

Furthermore, under Section 1(22) of the Interstate Commerce Act cost is determined for the particular line whose status is at issue. It is not determined by lumping the cost of that line together with the cost of other similar lines built by the carrier, much less by combining the cost of the line with the cost of lines built by other carriers. Yet that was precisely what the Commission did in this case. Although the carriers furnished the Commission with information on the estimated cost of a number of CATV channel service facilities the Commission did not make par-

ticularized findings with respect to all of those facilities.[34] It made findings on the cost of facilities in four communities noting that it ranged from $900,000 in one community to approximately $343,000 in another. It recognized that "other channel distribution systems are smaller and represent less investment" but it made no specific findings with respect to these other systems. Instead it simply found that "the total investment by the carriers amounts to millions of dollars." (R. 2867, ¶ 22). In dealing with cost the Commission thus lumped together CATV distribution systems that cost substantial amounts of money with those whose cost is relatively small and denied all of the systems exemption on the ground that the total cost of all of them is substantial. In effect the Commission determined that a CATV distribution system costing less than $10,000 is not covered by Section 214(a)(2) because a different and wholly unrelated CATV system costs approximately $900,000. No decisions under Section 1(22) of the Interstate Commerce Act sanction this aggregate approach.

Thus the Commission's findings on the cost of CATV distribution systems provide no rational basis for its conclusion. The Commission did not even attempt to explain its reasons for believing that cost, as such, deprives those systems of their essentially local character or otherwise takes them outside the scope of Section 214(a)(2). The Commission did not even attempt to find a basis for its conclusion in the specific words of Section 214(a)(2). It made

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[34] In response to the Common Carrier Bureau's information request of November 1, 1966, to the Bell Companies, the Commission was furnished data on four representative CATV systems. (CCB Ex. 2, R. 1486). The approximate investment there shown is Marion, Indiana, $900,000; Mexico, Missouri, $300,000; Morris, Illinois, $150,000; and Ironton, Ohio, less than $10,000. The Ironton, Ohio, system was so small, with only 34 drops, that it would not be classified as a community antenna television system under the Commission's rules for the regulation of such systems. (CCB Ex. 2 p. 1, R. 1486). In defining the term "community antenna television system" in 47 C.F.R. § 74.1101(a), the Commission's Rules exclude any system with less than 50 subscribers.

no findings that the amounts spent by the carriers for the construction of CATV distribution systems were so great as to threaten the financial stability or well-being of the carriers. It made no findings that the construction of CATV distribution systems created competition among carriers that was economically undesirable and that threatened to injure the public by increasing the cost of common carrier communication service.

The Commission also relied upon its assertion that CATV local distribution service is "significantly different from that theretofore provided." (R. 2867, ¶ 22). But this assertion ignores the fact that the service does not differ essentially from other communication services provided by the telephone companies, and in any event fails to explain why the alleged novelty of the service demonstrates that the lines which provide it are not local, branch, or terminal lines within the meaning of Section 214(a)(2).

The fundamental infirmity in the Commission's treatment of the Section 214(a)(2) issue is that the Commission simply refused to consider the words of the section or the statutory policy that those words were designed to achieve. Instead the Commission by using a mechanical test that it erroneously extracted from the opinion in *Texas & Pac. Ry.* v. *Gulf, Etc. Ry.* has failed to recognize that the lines here involved are essentially local in character; that even on the Commission's own view of their function they are the branch or the terminal lines of the main interstate communication channel of which the Commission alleges that they are a part; and that they are the kind of facilities that Congress intended to exempt from the certification requirements of the statute because the question "whether the construction should be allowed or compelled depends largely upon local conditions which the state regulating body is peculiarly fitted to appreciate." *Texas & Pac. Ry.* v. *Gulf, Etc. Ry., supra* at 278.

Conclusion

For all of the foregoing reasons the Commission's order should be set aside.

Respectfully submitted,

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October 16, 1968

STATUTORY ADDENDUM

Section 2 of the Communications Act of 1934, as amended (47 U.S.C. § 152):

(a) The provisions of this chapter shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided; but it shall not apply to persons engaged in wire or radio communication or transmission in the Canal Zone, or to wire or radio communication or transmission wholly within the Canal Zone.

(b) Subject to the provisions of section 301 of this title, nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier, or (2) any carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (3) any carrier engaged in interstate or foreign communication solely through connection by radio, or by wire and radio, with facilities, located in an adjoining State or in Canada or Mexico (where they adjoin the State in which the carrier is doing business), of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (4) any carrier to which clause (2) or clause (3) of this subsection would be applicable except for furnishing interstate mobile radio communication service or radio communication service to mobile stations on land vehicles in Canada or Mexico; except that sections 201-205 of this title shall,

except as otherwise provided therein, apply to carriers described in clauses (2)–(4) of this subsection.

Section 202(b) of the Communications Act of 1934, as amended (47 U.S.C. § 202(b)):

(b) Charges or services, whenever referred to in this chapter include charges for, or services in connection with, the use of common carrier lines of communication, whether derived from wire or radio facilities, in chain broadcasting or incidental to radio communication of any kind.

Section 205 of the Communications Act of 1934, as amended (47 U.S.C. § 205):

(a) Whenever, after full opportunity for hearing, upon a complaint or under an order for investigation and hearing made by the Commission on its own initiative, the Commission shall be of opinion that any charge, classification, regulation, or practice of any carrier or carriers is or will be in violation of any of the provisions of this chapter, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge or the maximum or minimum, or maximum and minimum, charge or charges to be thereafter observed, and what classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent that the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any charge other than the charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

(b) Any carrier, any officer, representative, or agent of a carrier, or any receiver, trustee, lessee, or agent of either of them, who knowingly fails or neglects to obey any order made under the provisions of this section shall forfeit to

the United States the sum of $1,000 for each offense. Every distinct violation shall be a separate offense, and in case of continuing violation each day shall be deemed a separate offense.

Section 214 of the Communications Act of 1934, as amended (47 U.S.C. § 214):

(a) No carrier shall undertake the construction of a new line or of an extension of any line, or shall acquire or operate any line, or extension thereof, or shall engage in transmission over or by means of such additional or extended line, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line: *Provided,* That no such certificate shall be required under this section for the construction, acquisition, or operation of (1) a line within a single State unless such line constitutes part of an interstate line, (2) local, branch, or terminal lines not exceeding ten miles in length, or (3) any line acquired under section 221 or 222 of this title: *Provided further,* That the Commission may, upon appropriate request being made, authorize temporary or emergency service, or the supplementing of existing facilities, without regard to the provisions of this section. No carrier shall discontinue, reduce, or impair service to a community, or part of a community, unless and until there shall first have been obtained from the Commission a certificate that neither the present nor future public convenience and necessity will be adversely affected thereby; except that the Commission may, upon appropriate request being made, authorize temporary or emergency discontinuance, reduction, or impairment of service, or partial discontinuance, reduction, or impairment of service, without regard to the provisions of this section. As used in this section the term "line" means any channel of communication established by the use of appropriate equipment, other than a channel of communication estab-

lished by the interconnection of two or more existing channels: *Provided, however,* That nothing in this section shall be construed to require a certificate or other authorization from the Commission for any installation, replacement, or other changes in plant, operation, or equipment, other than new construction, which will not impair the adequacy or quality of service provided.

(b) Upon receipt of an application for any such certificate, the Commission shall cause notice thereof to be given to, and shall cause a copy of such application to be filed with, the Secretary of the Army, the Secretary of the Navy, and the Governor of each State in which such line is proposed to be constructed, extended, acquired, or operated, or in which such discontinuance, reduction, or impairment of service is proposed, with the right to those notified to be heard; and the Commission may require such published notice as it shall determine.

(c) The Commission shall have power to issue such certificate as applied for, or to refuse to issue it, or to issue it for a portion or portions of a line, or extension thereof, or discontinuance, reduction, or impairment of service, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. After issuance of such certificate, and not before, the carrier may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, extension, acquisition, operation, or discontinuance, reduction, or impairment of service covered thereby. Any construction, extension, acquisition, operation, discontinuance, reduction, or impairment of service contrary to the provisions of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, the State commission, any State affected, or any party in interest.

(d) The Commission may, after full opportunity for hearing, in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier, party to such proceeding, to provide itself with adequate facilities for the expeditious and efficient performance of its service as a common carrier and to extend its line or to establish a public office; but no such authorization or order shall be made unless the Commission finds, as to such provision of facilities, as to such establishment of public offices, or as to such extension, that it is reasonably required in the interest of public convenience and necessity, or as to such extension or facilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public. Any carrier which refuses or neglects to comply with any order of the Commission made in pursuance of this subsection shall forfeit to the United States $100 for each day during which such refusal or neglect continues.

Section 221(b) of the Communications Act of 1934, as amended (47 U.S.C. § 221(b)):

Subject to the provisions of section 301 of this title, nothing in this chapter shall be construed to apply, or to give the Commission jurisdiction, with respect to charges, classifications, practices, services, facilities, or regulations for or in connection with wire, mobile, or point-to-point radio telephone exchange service, or any combination thereof, even though a portion of such exchange service constitutes interstate or foreign communication, in any case where such matters are subject to regulation by a State commission or by local governmental authority.

Sections 312(b)-(e) of the Communications Act of 1934, as amended (47 U.S.C. § 312(b)-(e)):

(b) Where any person (1) has failed to operate substantially as set forth in a license, (2) has violated or failed to observe any of the provisions of this chapter, or section

1304, 1343, or 1464 of Title 18, or (3) has violated or failed to observe any rule or regulation of the Commission authorized by this chapter or by a treaty ratified by the United States, the Commission may order such person to cease and desist from such action.

(c) Before revoking a license or permit pursuant to subsection (a) of this section, or issuing a cease and desist order pursuant to subsection (b) of this section, the Commission shall serve upon the licensee, permittee, or person involved an order to show cause why an order of revocation or a cease and desist order should not be issued. Any such order to show cause shall contain a statement of the matters with respect to which the Commission is inquiring and shall call upon said licensee, permittee, or person to appeal before the Commission at a time and place stated in the order, but in no event less than thirty days after the receipt of such order, and give evidence upon the matter specified therein; except that where safety of life or property is involved, the Commission may provide in the order for a shorter period. If after hearing, or a waiver thereof, the Commission determines that an order of revocation or a cease and desist order should issue, it shall issue such order, which shall include a statement of the findings of the Commission and the grounds and reasons therefor and specify the effective date of the order, and shall cause the same to be served on said licensee, permittee, or person.

(d) In any case where a hearing is conducted pursuant to the provisions of this section, both the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the Commission.

(e) The provisions of section 1008(b) of Title 5 which apply with respect to the institution of any proceeding for the revocation of a license or permit shall apply also with respect to the institution, under this section, of any proceeding for the issuance of a cease and desist order.

Section 1(18) of the Interstate Commerce Act (49 U.S.C. § 1(18)):

No carrier by railroad subject to this chapter shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this chapter over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment. Nothing in this paragraph or in section 5 of this title shall be considered to prohibit the making of contracts between carriers by railroad subject to this chapter, without the approval of the Commission, for the joint ownership or joint use of spur, industrial, team, switching, or side tracks.

Section 1(19) of the Interstate Commerce Act (49 U.S.C. § 1(19)):

The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the Commission may from time to time prescribe, and the provisions of this chapter shall apply to all such proceedings. Upon receipt of any application for such certificate the Commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which such additional or extended line of railroad is proposed to be constructed or operated, or all or any portion of a line of railroad, or the operation thereof, is proposed to be abandoned, with the right to be heard as hereinafter provided with respect to the hearing of com-

plaints or the issuance of securities; and said notice shall also be published for three consecutive weeks in some newspaper of general circulation in each county in or through which said line of railroad is constructed or operates.

Section 1(20) of the Interstate Commerce Act (49 U.S.C. § 1(20)):

The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both.

Section 1(21) of the Interstate Commerce Act (49 U.S.C. § 1(21)):

The Commission may, after hearing, in a proceeding upon complaint or upon its own initiative without com-

plaint, authorize or require by order any carrier by railroad subject to this chapter, party to such proceeding, to provide itself with safe and adequate facilities for performing as a common carrier its car service as that term is used in this chapter, and to extend its line or lines: *Provided,* That no such authorization or order shall be made unless the Commission finds, as to such extension, that it is reasonably required in the interest of public convenience and necessity, or as to such extension or facilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public. Any carrier subject to this chapter which refuses or neglects to comply with any order of the Commission made in pursuance of this paragraph shall be liable to a penalty of $100 for each day during which such refusal or neglect continues, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

Section 1(22) of the Interstate Commerce Act (49 U.S.C. § 1(22)):

The authority of the Commission conferred by paragraphs (18) to (21) of this section, both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching, or side tracks, located or to be located wholly within one State, or of street, suburban, or interrurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation.

Section 15(1) of the Interstate Commerce Act (49 U.S.C. § 15(1)):

Whenever, after full hearing, upon a complaint made as provided in section 13 of this title, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint

rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this chapter for the transportation of persons or property, as defined in section 1 of this title, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this chapter, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this chapter, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation of practice so prescribed.

BRIEF FOR INTERVENOR CITY OF NEW YORK

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,116

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA, *et al.*,

Petitioners,

—v.—

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,

Respondents,

NATIONAL CABLE TELEVISION ASSOCIATION, INC.,
TELEPROMPTER CORPORATION, *et al.*,
STORER BROADCASTING COMPANY,
CITY OF NEW YORK,
COX-COSMOS, INC.,

Intervenors.

ON APPEAL FROM DECISION OF THE FEDERAL COMMUNICATIONS COMMISSION

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December 13, 1968.

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—v.—

Federal Communications Commission and United States of America,

Respondents,

National Cable Television Association, Inc.,
Teleprompter Corporation, *et al.*,
Storer Broadcasting Company,
City of New York,
Cox-Cosmos, Inc.,

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ON APPEAL FROM DECISION OF THE FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR INTERVENOR CITY OF NEW YORK

Preliminary Statement

After more than a year of investigation, the Federal Communications Commission (hereafter the "Commission") decided last June that Section 214 of the Communications Act of 1934[1] "is applicable to the construction of channel

[1] 47 U.S.C. §151 *et seq.;* unless designated otherwise, all statutory references herein are to that Act.

distribution systems for CATV operators"[2] by appellant telephone companies. Section 214 provides, in part:

> (a) No carrier shall undertake the construction of a new line or of an extension of any line, or shall acquire or operate any line, or extension thereof, or shall engage in transmission over or by means of such additional or extended line, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line: *Provided,* That no such certificate shall be required under this section for the construction, acquisition, or operation of (1) a line within a single state unless such line constitutes part of an interstate line, (2) local, branch, or terminal lines not exceeding ten miles in length, or (3) any line acquired under section 221 or 222 of this Act: *Provided further,* That the Commission may . . . authorize temporary or emergency service . . . without regard to the provisions of this section. . . . As used in this section the term "line" means any channel of communication established by the use of appropriate equipment, other than a channel of communication established by the interconnection of two or more existing channels. . . .

The effect of the decision was to require telephone companies to obtain Commission certification before constructing coaxial distribution cables to carry television signals from the headend of a CATV system to its subscribers' premises, even where such cables were wholly within a single state.

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[2] 13 F.C.C. 2d 448, 460 (1968) (hereafter the "Decision").

The Associated Bell System, General Telephone System, and United Utilities, Inc. companies duly appealed the Commission's decision to this Court, and on September 27, 1968, this Court granted the City of New York (hereafter the "City") leave to intervene.

The Commission had previously permitted the City to intervene in the agency proceeding.[3] The purpose of such intervention was to "impart to . . . [the Commission] an insight into how the final determination will affect the interest of the City's residents." [4]

The Commission's Decision

The Commission held, among other things, (1) that the channel service offerings provided by a telephone company related to a common carrier's communications service undertakings and thus constituted a common carrier service;[5] (2) that the intelligence transmitted by a telephone company in providing such channel service to CATV systems constituted interstate communications subject to the Commission's jurisdiction;[6] and (3) that the channel distribution facilities, though not themselves crossing a state boundary, were part of an interstate line and therefore not exempt under Section 214 (a) (1) from the certification requirements.[7] The Commission reasoned that since neither the definition of a "line" [8] nor the legislative his-

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[3] Commission Order, released May 15, 1967, Volume 1 of the Record, Page 169 (F.C.C. 67M-803).

[4] Petition For Leave To Intervene, submitted by The City of New York, dated March 20, 1967, p. 8.

[5] Decision, paragraph 12.

[6] *Id.*, paragraph 13.

[7] *Id.*, paragraph 20.

[8] A "line" is "any channel of communication established by the use of appropriate equipment. . . ." 47 U.S.C. §214(a).

tory of Section 214 indicated an intent to limit the certification requirements to situations where the physical facilities of a telephone company cross a state boundary it would be in disregard of "a primary Congressional concern over the channel of communication, rather than merely over the wires and cables, i.e., the equipment, used to establish the channel" [9] to hold otherwise. Since the broadcaster's signal initiates the interstate channel of communication,[10] the CATV distribution system offered by a telephone company is a "link" in the transmission of that signal to the premises of the subscriber and therefore a part of that interstate line or channel.[11] Telephone company construction of the distribution cables thus requires a Commission certificate.

Argument

The Commission's decision is a logical extension of the rationale underlying the Supreme Court's holding in *United States* v. *Southwestern Cable Co.*[12] Moreover, as a practical matter affirmance of the decision would promote the basic Congressional purpose in enacting the Communications Act, whereas reversal would frustrate that purpose by leaving an important segment of the radio-television industry virtually unregulated.

In the *Southwestern Cable* case, the respondent CATV operator contested the authority of the Commission to issue a prohibitory order pursuant to the Commission's distant signal regulation.[13] The Court upheld the Com-

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[9] Decision, paragraph 18.

[10] *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 168-69 (1968).

[11] Decision, paragraph 18.

[12] 392 U.S. 157 (1968).

[13] 47 CFR §74.1107(a).

mission's assertion of jurisdiction over the CATV operator and clarified the relationship between the Commission and a CATV operator by saying that, "the authority which we recognize today under §152(a) is restricted to that reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting." [14] The Court reasoned that although Title III of the Act, which deals with the regulation of radio and television broadcasting, does not specifically mention CATV distribution systems, "the Commission has been charged with broad responsibilities for the orderly development of . . . local television broadcasting" [15] under Title I, and since a CATV operator is engaged in the simultaneous retransmission of television signals the regulation of his distribution system is an important concomitant to the regulation of television broadcasting.

The instant case arises out of Title II of the Act, which deals with the regulation of common carriers. The Commission has attempted to coordinate its Title I responsibilities for the orderly development of local television broadcasting, with its specific powers over common carriers under Title II where the latter engage in the distribution of television broadcasting signals. This approach is consistent with the reasoning underlying the *Southwestern Cable* case because the carrier's channel distribution offerings are an important link in the transmission of the television broadcaster's signals and regulation thereof is an essential concomitant to the Commission's Title I responsibilities for the orderly development of local television broadcasting. Furthermore, the Commission's decision is a necessary extension of the practical effect of the *South-*

[14] 392 U.S. 157 at 178.

[15] *Id.* at 177.

western Cable case because the authority to regulate the CATV operator would be severely limited absent the authority to regulate his cable distribution system when the same is provided by a common carrier. It is only by such an approach that the Commission can fulfill the Congressional mandate "to make available, as far as possible, to all the people of the United States a rapid, efficient, nation-wide, and world-wide wire and radio communication *service*. . . ." [16] (Emphasis supplied) Indeed, the Act itself recognizes the Commission's view of its responsibilities by defining "services" to mean "services in connection with, the use of common carrier lines of communication, *whether derived from wire or radio facilities,* in chain broadcasting, *or incidental to radio communication of any kind.*" [17] (Emphasis supplied)

In the instant case the Commission has, in effect, treated the CATV industry as an integral part of the nation's overall radio-television policy. Such an approach is in conformity with that recommended by the special Presidential committee reporting on telecommunications.[18]

A reversal of the Commission's decision, aside from being inconsistent with the *Southwestern Cable* case would pose a very real danger that the burgeoning[19] new CATV sector of the wire and radio industry would develop in a hapazard fashion without regard to the overall public interest and the basic policy of the Communications Act.

The current situation in New York City illustrates the point.

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[16] 47 U.S.C. §151.

[17] 47 U.S.C. §202(b).

[18] The New York Times, Dec. 10, 1968, p. 1, col. 5.

[19] "New systems are being founded at the rate of more than one per day, and . . . subscribers . . . signed on at the rate of 15,000 per month." Note, *The Wire Mire: The FCC and CATV,* 79 Harv. L. Rev. 366, 368 (1965).

In the City there are two types of cable television systems in operation, each on a small scale but with apparent promise of explosive growth. In one type the transmission facilities physically occupying the public streets are owned and completely controlled by the CATV operator himself; in the other type of system, those facilities are owned and controlled by New York Telephone Company, which provides a transmission service to which the CATV operator subscribes. This difference between the two types of systems produces radically different legal consequences for them. The first type is subject to the City's franchise power while the other, as state law stands today, is not. *City of New York* v. *Comtel, Inc.*[20]

As a result, the first type of system is required, among other things, to provide service to all segments of the community in which it operates and thus not to discriminate on the basis of economic fruitfulness, to provide high quality service, to charge rates specified by the City, to provide service at reduced rates to educational, charitable and eleemosynary institutions and municipal departments, to provide service without charge to certain municipal agencies, to provide maintenance crews to make repairs on a 24-hour basis, and pay to the City five percent of its gross receipts.

At present there is no legal mechanism under which the City can achieve these results with respect to the second type of system. The only regulatory control that has been exercised to date with respect to the channel service offerings of New York Telephone Company is that of the New York State Public Service Commission and the Federal Communications Commission to approve the carrier's tar-

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[20] 57 Misc.2d 585, 293 N.Y.S.2d 599 (Sup. Ct., N.Y. Co., 1968), aff'd —— A.D.2d —— (1st Dep't, 1968), motion for leave to appeal pending.

iffs. The Public Service Commission has refrained completely from regulating the CATV operator himself and probably has no power to do so. It is true that the City possesses vaguely defined licensing powers but there is doubt whether these can be adapted to meet the challenge of a rapidly changing CATV industry; more important, it is questionable whether these powers would be adequate to assure service to the poorer communities in the City and to guarantee that public rather than private interests would benefit from any windfall which the new industry may create for those who would necessarily acquire certain monopolistic advantages.

Thus, absent Commission jurisdiction over a carrier's construction of CATV channel service offerings, there seems likely to be either a minimum of governmental regulation or simply unofficial regulation by the telephone company over entry into the CATV industry in New York. It is difficult to envisage prospective CATV operators, except in rare instances, opting for a regulated type of system over the unregulated type. Furthermore, even if a comprehensive state or municipal regulatory scheme for the development of the CATV industry should be fashioned, by the legislature or otherwise, at some future date, it seems likely that nonconforming vested rights might well have been established in the meantime, thereby frustrating the effectiveness of any such plan. As Mayor Lindsay's Advisory Task Force on CATV and Telecommunications recently reported, such a situation would presage ominous consequences for the City.[21]

On the other hand, if the instant assertion of Commission jurisdiction is upheld, the possibility of orderly and systematic development of cable television in the City would

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[21] *A Report on Cable Television and Cable Telecommunications in New York City* (September 17, 1968).

become a reality. Commission certification would serve to supplement the City's enfranchising scheme by effectively regulating entry into that sector of the CATV industry which subscribes to the carrier's distribution facilities. In approving or denying applications for carrier certification, the Commission could take into account all of the myriad factors bearing on how service to a particular CATV operator would affect the public interest, including the degree to which the proposed operation ties in with the City's own projected regulatory pattern. Public convenience and necessity would be determined by a public authority possessing the technical expertise required for such a decision. Furthermore, the Commission would serve as a centralized forum in which local governments could present their opinions with respect to the public convenience and necessity of a distribution system of television signals within their respective boundaries. Indeed, the very nature of cable television commands that the federal and local governments work to supplement one another's efforts.

There is no reason to believe that the circumstance in which the City finds itself is atypical. The mushrooming growth of CATV systems has not been met by comprehensive state regulation.[22] Whether this reluctance on the part of local regulatory bodies to come to grips with the CATV industry is due to a lack of technological awareness or to recognition that regulation of radio and television communication has historically been essentially a federal responsibility, the fact remains that local analysis of public convenience and necessity is scant. The Commission,

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[22] As of 1965 only two states, Connecticut and Nevada, regulated CATV on a comprehensive scale. M. Seiden, *An Economic Analysis of Community Antenna Television Systems and the Television Broadcasting Industry*, 44-47 (1965).

on the other hand, has begun[23] and is continuing a thorough investigation into and analysis of the CATV industry and the effect of its impact on the television broadcasting industry. It has thus determined that CATV systems are a federal concern under the Communications Act.[24] The Supreme Court has recently affirmed that determination.[25] This decision should be no less compelling when dealing with a common carrier which provides the facilities that carry the television signals for the CATV operator. The opportunity for effective federal-local regulation in an area of communications imbued with such public interest as that of the CATV industry should not be discarded.

CONCLUSION

For the foregoing reasons the Commissions decision should be affirmed.

Respectfully submitted,

Dated: December 13, 1968

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[23] *CATV: First Report and Order,* 38 F.C.C. 683 (1962).

[24] *CATV: Second Report and Order,* 2 F.C.C. 2d 725 (1966).

[25] *United States* v. *Southwestern Cable Co.,* 392 U.S. 157 (1968).

STATUTORY ADDENDUM

Section 2 of the Communications Act of 1934, as amended (47 U.S.C. § 152):

(a) The provisions of this chapter shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided; but it shall not apply to persons engaged in wire or radio communication or transmission, in the Canal Zone, or to wire or radio communication or transmission wholly within the Canal Zone.

(b) Subject to the provisions of section 301 of this title, nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier, or (2) any carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (3) any carrier engaged in interstate or foreign communication solely through connection by radio, or by wire and radio, with facilities, located in an adjoining State or in Canada or Mexico (where they adjoin the State in which the carrier is doing business), of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (4)

any carrier to which clause (2) or clause (3) of this subsection would be applicable except for furnishing interstate mobile radio communication service or radio communication service to mobile stations on land vehicles in Canada or Mexico; except that sections 201-205 of this title shall, except as otherwise provided therein, apply to carriers described in clauses (2)-(4) of this subsection.

Section 202(b) of the Communications Act of 1934, as amended (47 U.S.C. § 202(b)):

(b) Charges or services, whenever referred to in this chapter include charges for, or services in connection with, the use of common carrier lines of communication, whether derived from wire or radio facilities, in chain broadcasting or incidental to radio communication of any kind.

Section 205 of the Communications Act of 1934, as amended (47 U.S.C. § 205):

(a) Whenever, after full opportunity for hearing, upon a complaint or under an order for investigation and hearing made by the Commission on its own initiative, the Commission shall be of opinion that any charge, classification, regulation, or practice of any carrier or carriers is or will be in violation of any of the provisions of this chapter, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge or the maximum or minimum, or maximum and minimum, charge or charges to be thereafter observed, and what classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent that the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any charge other than the charge so

prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

(b) Any carrier, any officer, representative, or agent of a carrier, or any receiver, trustee, lessee, or agent of either of them, who knowingly fails or neglects to obey any order made under the provisions of this section shall forfeit to the United States the sum of $1,000 for each offense. Every distinct violation shall be a separate offense, and in case of continuing violation each day shall be deemed a separate offense.

Section 214 of the Communications Act of 1934, as amended (47 U.S.C. § 214):

(a) No carrier shall undertake the construction of a new line or of an extension of any line, or shall acquire or operate any line, or extension thereof, or shall engage in transmission over or by means of such additional or extended line, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line: *Provided,* That no such certificate shall be required under this section for the construction, acquisition, or operation of (1) a line within a single State unless such line constitutes part of an interstate line, (2) local, branch, or terminal lines not exceeding ten miles in length, or (3) any line acquired under section 221 or 222 of this title: *Provided further,* That the Commission may, upon appropriate request being made, authorize temporary or emergency service, or the supplementing of existing facilities, without regard to the provisions of this section. No carrier shall discontinue, reduce,

or impair service to a community, or part of a community, unless and until there shall first have been obtained from the Commission a certificate that neither the present nor future public convenience and necessity will be adversely affected thereby; except that the Commission may, upon appropriate request being made, authorize temporary or emergency discontinuance, reduction, or impairment of service, or partial discontinuance, reduction, or impairment of service, without regard to the provisions of this section. As used in this section the term "line" means any channel of communication established by the use of appropriate equipment, other than a channel of communication established by the interconnection of two or more existing channels: *Provided, however,* That nothing in this section shall be construed to require a certificate or other authorization from the Commission for any installation, replacement, or other changes in plant, operation, or equipment, other than new construction, which will not impair the adequacy or quality of service provided.

(b) Upon receipt of an application for any such certificate, the Commission shall cause notice thereof to be given to, and shall cause a copy of such application to be filed with, the Secretary of the Army, the Secretary of the Navy, and the Governor of each State in which such line is proposed to be constructed, extended, acquired, or operated, or in which such discontinuance, reduction, or impairment of service is proposed, with the right to those notified to be heard; and the Commission may require such published notice as it shall determine.

(c) The Commission shall have power to issue such certificate as applied for, or to refuse to issue it, or to issue it for a portion or portions of a line, or extension thereof, or discontinuance, reduction, or impairment of service, described in the application, or for the partial exercise only

of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. After issuance of such certificate, and not before, the carrier may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, extension, acquisition, operation, or discontinuance, reduction, or impairment of service covered thereby. Any construction, extension, acquisition, operation, discontinuance, reduction, or impairment of service contrary to the provisions of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, the State commission, any State affected, or any party in interest.

(d) The Commission may, after full opportunity for hearing, in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier, party to such proceeding, to provide itself with adequate facilities for the expeditious and efficient performance of its service as a common carrier and to extend its line or to establish a public office; but no such authorization or order shall be made unless the Commission finds, as to such provision of facilities, as to such establishment of public offices, or as to such extension, that it is reasonably required in the interest of public convenience and necessity, or as to such extension or facilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public. Any carrier which refuses or neglects to comply with any order of the Commission made in pursuance of this subsection shall forfeit to the United States $100 for each day during which such refusal or neglect continues.

Section 221(b) of the Communications Act of 1934, as amended (47 U.S.C. § 221(b)):

Subject to the provisions of section 301 of this title, nothing in this chapter shall be construed to apply, or to give the Commission jurisdiction, with respect to charges, classifications, practices, services, facilities, or regulations for or in connection with wire, mobile, or point-to-point radio telephone exchange service, or any combination thereof, even though a portion of such exchange service constitutes interstate or foreign communication, in any case where such matters are subject to regulation by a State commission or by local governmental authority.